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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 214.

THE TOWN OF TONAWANDA, NEW YORK, AND JOHN K. PATTON, SUPERVISOR OF SAID TOWN, APPELLANTS,

*vs.*

JAMES B. LYON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 27, 1900.

(17,657.)

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INDEX.


| | Original. | Print. |
|---|---|---|
| Statement | 1 | 1 |
| Bill of complaint | 3 | 2 |
| Subpœna and return | 19 | 12 |
| Restraining order, &c. | 20 | 13 |
| Return to order to show cause | 22 | 14 |
| Appearance for defendants | 24 | 15 |
| Motion for leave to file amended demurrer and plea, &c | 25 | 15 |
| Order granting leave to file amended demurrer and plea *nunc pro tunc* | 26 | 15 |
| Amended demurrer and plea | 27 | 16 |
| Interlocutory decree on demurrer | 41 | 25 |
| Order continuing injunction | 43 | 26 |
| Answer | 45 | 27 |
| Final decree | 49 | 29 |
| Affidavit of James B. Lyon | 52 | 31 |


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| | Orig. | Print. |
|---|---|---|
| Affidavit of John Cunneen | 53 | 31 |
| Affidavit of John K. Patton | 56 | 32 |
| Stipulation as to facts | 57 | 34 |
| Opinion | 59 | 35 |
| Bond on appeal | 82 | 48 |
| Assignment of errors | 87 | 50 |
| Petition for appeal | 92 | 53 |
| Allowance of appeal | 92 | 53 |
| Citation and service | 93 | 53 |
| Clerk's certificate | 95 | 54 |

1 *Statement.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON, Complainant,
*vs.*
THE TOWN OF TONAWANDA and JOHN E. PATTEN, Supervisor of the Town of Tonawanda, Erie County, Defendants. } In Equity. No. 6778.

On the 9th day of September, 1899, the complainant filed his bill of complaint against the defendants above named, which bill of complaint is hereto annexed.

A subpœna to appear and answer was thereupon issued and served personally upon the defendants.

The defendants thereafter duly appeared in said cause by John Cunneen as their solicitor, and on the 23d day of September, 1899, filed a plea and demurrer to said bill, which said plea and demurrer were withdrawn and an amended plea and demurrer, which is hereto annexed, filed in lieu thereof.

On the 23d day of September, 1899, said plea and demurrer to the bill came on for argument in conjunction with a motion for an injunction before the Hon. Alfred C. Coxe, judge, at a term of this court held at Utica.

On the 18th of December, 1899, a decision was duly filed overruling the plea and demurrer and granting a preliminary injunction.

2 On the 17th day of January, 1900, an order was duly made overruling said plea and demurrer in accordance with said decision, and an order likewise made continuing the injunction, which orders are hereunto annexed.

On the 17th day of January, 1900, defendants filed their answer to the bill, which answer is hereunto annexed.

The case was thereafter and on the 17th day of January, 1900, brought on for argument on stipulated testimony and affidavits before the Hon. Alfred C. Coxe, judge, at a term of this court held at Albany, and a final decree was then and there made and entered, which final decree is hereunto annexed.

3 *Bill.*

Circuit Court of the United States for the Northern District of New York. In Equity.

JAMES B. LYON, Complainant,
*vs.*
THE TOWN OF TONAWANDA and JOHN K. PATTEN, Supervisor of the Town of Tonawanda, Erie County, Defendants.

To the judges of the circuit court of the United States for the northern district of New York:

James B. Lyon, who is a citizen of the State of New York, and of the United States, brings this his bill in equity, into this court against

the Town of Tonawanda, which is a municipal corporation, duly organized and existing under chapter 147 of the Laws of 1836 of the State of New York, and chapter 569 of the Laws of 1890 as amended by chapter 254 of the Laws of 1891, and by chapters 61, 92 and 252 of the Laws of the State of New York, in Erie county in said State, and John K. Patten, supervisor of said town of Tonawanda, in Erie county in said State, all in said northern district of New York; and thereupon your orator complains and shows, upon information and belief, that your orator is the owner in fee and entitled to the

4 possession of two certain tracts or parcels of land, situated in said town of Tonawanda, county of Erie and State of New York, and known and described on the assessment-roll and advertisement of sale hereinafter mentioned, as parcels Nos. 59 and 62, and hereinafter referred to as parcels Nos. 59 and 62, which said parcel No. 59 is bounded and described as follows:

All that tract or parcel of land, situate in the town of Tonawanda county of Erie and State of New York, and being part of lot 39, township 12 and range 8 of the Holland Land Company survey, and bounded and described as follows: Beginning at the intersection of the southerly line of said lot 39 with the easterly line of Military road, regarded as 5-rod road; thence northerly along the east line of said road 485.76 feet; thence easterly 3,351.55 feet to a point in the easterly line of said lot 521.78 feet northerly from the southeast corner of said lot; thence southerly along the east line of said lot 521.78 feet to the southeast corner of said lot; thence westerly along the south line of said lot 3,466.75 feet to the place of beginning, excepting and reserving therefrom a strip of land 66 feet in width running across said premises, heretofore conveyed to Daniel F. Callahan for a railway by deed recorded in Erie county clerk's office in Liber 678 of Deeds, p. 181.

And which parcel No. 62 is bounded and described as follows:

All that tract or parcel of land, situate in the town of Tonawanda, county of Erie and State of New York, and being part of lot 34, township 12 and range 8 of the Holland Land Company's survey, and bounded as follows: Beginning at the southwest corner of said lot 34, running thence northerly along the east line of lot 39, 521.78 feet; thence easterly 842.48 feet to the center of Delaware street; thence southeasterly along the center of Delaware street about 562.43 feet to the south line of said lot 34; thence westerly along the south line of said lot 34, 1,012.85 feet to the place of beginning.

5 That said Delaware street is now, and for over twenty years last past has been, a public street and highway between the city of Buffalo and the village of Tonawanda in said county of Erie and State of New York, and wholly within the boundaries of said town of Tonawanda, outside of the limits of any city or village corporation.

That during the year 1893, pursuant to an act of the legislature of the State of New York, known as chapter 550 of the Laws of 1893, entitled "An act to authorize the town of Tonawanda, Erie county, to incur an indebtedness for the purpose of grading, gravelling, macadamizing or paving certain highways therein extending from

the village of Tonawanda to the city of Buffalo, and authorizing the town board to make such improvement," the town board of said town of Tonawanda met, ascertained and determined the probable expense of grading and paving said Delaware street, such highway, extending from said village to said city of Buffalo, with vitrified brick and other material, and took such further steps and proceedings after the making of said determination and in accordance with the provisions of said statute, that it ordered the improvement of paving said Delaware street as aforesaid to be made, and incurred an indebtedness therefor to the amount of $232,791.26, and did cause to be issued negotiable bonds of said town for the providing of funds for the expenses of said improvement to a like amount, to wit, said sum of $232,791.26, and sold said bonds, and thereafter and for the purpose of providing for the payment and discharge of said bonded indebtedness, said town board caused a list to be made of all the several lots or parcels of land to be subjected thereupon and bounding on said Delaware street, such highway so improved, describing each parcel and lot thereof and specifying the number of lineal feet of its frontage or boundary on the part of said highway so improved, which said list was duly filed with the town clerk of said town, and such other steps and proceedings taken that said board affirmed the same and it became final and
6 conclusive upon all parties concerned as an assessment and lien superior to all other rights, title or estate therein, upon the several lots or parcels of land respectively specified thereon, to the full amount of such sum of $232,791.26; that in and by said chapter 550 of the Laws of 1893 it was provided that so much of said assessment should be raised from each separate lot or parcel of land fronting on said street and highway so improved as shall be in the same proportion to the entire amount assessed as the number of feet for which the same shall bound or front upon said street and highway so improved, shall be in the aggregate number of feet of frontage or bounds subjected to said assessment by the order of said town board as aforesaid. And it was further provided in and by said statute and act, that a statement should be indorsed by the town clerk upon a correct copy of said list showing when the same became final and conclusive as aforesaid, and said copy and statement should be delivered to the supervisor of the town, and that the town board, or by its direction, the supervisor should thereupon set down upon such statement and against each such lot or parcel of land, its just proportional part of said assessment computed under the rule aforesaid, and file the same with the town clerk, the same to become payable to the supervisor of the town at or within the time specified in order of the town board directing said improvement, and that interest on all such assessment or installments thereof not paid when due and within the time or times mentioned in said order, should become payable from such default at and after the rate of 10 per centum per annum, and such interest should also become a lien upon the land from which the assessment so in default should be payable; and said act and statute also provided that when default should be made in the payment of all or any part

of said assessment for thirty days after it became due, it should be the duty of the supervisor of said town then in office to advertise the lot or parcel of land upon which the same
7 is payable for sale, to sell the same at public auction without credit, to the highest bidder, and if the lands were not redeemed within one year said supervisor should convey to the purchaser at such sale upon payment by him of the amount of his bid, such parcel of land in fee-simple, and that thereupon the town should be bound to its grantee, his successors in title as grantor of said lands, with implied covenants of warranty and seizin, and that said deed of conveyance should briefly recite the proceedings in ordering the improvement and making of such assessment, and should be conclusive evidence that the proceedings were regular and valid. Said act and statute further provided that said supervisor should apply the proceeds of such sale,—first, to his fees and disbursements for making the sale, being the same fees to which a sheriff should be entitled for selling lands on execution, which fees and disbursements were to be a charge on the lands; second,—to apply the remainder of the proceeds of such sale to the payment of the amount of any assessment charged against the lands sold under the provisions of said act, and then to be applied to the payment of said bonded indebtedness so incurred by said town for making said improvement as aforesaid.

And it was also in and by said act, made the duty of said supervisor to personally attend all such sales of real estate, and if the highest sum which had been bid by others for any parcel of land should not be sufficient to pay the assessment with interest and expenses of sale, and he should regard it best for the town to do so, to purchase and take title to said lands in the name of the town, and that thereupon said amount shall be paid from the fund acquired from the sale of said bonds or should be charged against said town.

And your orator further shows upon information and belief, that all of said steps and proceedings provided and required to be taken under and by virtue of said chapter 550 of the Laws of 1893, were taken by said town board and said town clerk under said act, except to advertise said property for sale, and said
8 list and assessment became affirmed and was final as provided in said act, and there was levied, assessed and set down upon the statement and copy of said list, delivered to said supervisor, as the part of said assessment to be raised from said parcels of land Nos. 59 and 62 hereinbefore described, so much of said assessment as was in the same proportion to the entire amount assessed as the number of feet for which said parcels bounded and fronted upon said highway so improved as aforesaid were in the aggregate *the* number of feet and frontage and bounds subjected to said assessment by the order of said town board as aforesaid, and a correct copy of said list and statement having set down upon it and against each of said lots and parcels of lands, its proportional part of said assessment, computed under the rule aforesaid, was delivered to the supervisor of said town and filed with the town clerk. That thereafter nothing further was done in reference thereto until the year

1895, when the legislature of the State of New York enacted a certain statute and act, known as chapter 816 of the Laws of 1895, and entitled "An act enlarging and modifying the powers of town officers in towns within counties having over three hundred thousand inhabitants, and providing for public improvements within such towns, excepting the counties of New York and Kings," by which act it was provided that in each town in the State of New York having a population of 3,000 or upwards, situated in a county having a population of 300,000 or upwards, excluding New York and Kings counties, adjoining a city having a population of over 250,000 inhabitants, the supervisor, town clerk, justice of the peace and commissioner or commissioners of highways, were constituted a board of highway commissioners, and the town board of the town, and were vested with certain powers in said act especially described, reference to which is hereby made for greater certainty, which said act by its terms and limitations was applicable and had reference to and could only apply and have reference to said town of Tonawanda in Erie county in the State of New York.

And in and by said act it was provided and enacted that when any highway or part of highway within any such town had been paved or otherwise permanently improved under any law providing for the assessment of such expense locally, such highway should be subject to control and management of said board, and where any part of the expense of making such improvement, including interest on moneys borrowed, and all other incidental expenses in anywise pertaining to the making of said improvement or money borrowed for that purpose by the town, should remain unpaid at the time said act went into effect, said board should be authorized and empowered, and it should be its duty to cause to be assessed the entire expense of the improvement aforesaid upon the several lots or parcels of land fronting or bounding upon that part of the highway so improved as aforesaid, in the manner provided by said statute for making local assessments for raising the expenses of grading and paving of streets, and pursuant to the rules of apportionment and division of the expense therein provided. And that where bonds of the town had been issued and sold to obtain money for the purpose of making such improvement, said assessments should be so made by said board as to become due and collectible at the time and in the amounts necessary for the payment of said bonds as they should become payable, principal and interest.

And said act also provided and enacted that the expense of local improvements for paving or macadamizing any highway should be assessed upon the lands fronting or bounding on both sides of the part of the highway upon which the improvement was made, and that so much of the expenses of the improvement should be raised from each separate lot or parcel of land as shall be in the same proportion to the entire expense locally assessed as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made shall be to the aggregate number of feet of frontage or bounds

to be subjected to the entire assessment, and that the expense of the improvement should include the cost of surveys, estimates, printing, interest on moneys borrowed, and all other expenses or outlays which will be occasioned by reason of the improvements, and that all such assessments should bear interest at and after the rate of 1 per centum thereof for each month or fraction of a month that the same should remain unpaid, after they became due and payable, which interest shall be a lien upon the lot or parcel of land in addition to the principal from the day the same shall become due prior and superior to all other liens, estates or interest therein or thereon, and if any assessment or installment of any assessment should not be paid within one year after the same became due, then the entire assessment should be due forthwith and the supervisor of the town should proceed to advertise and sell the land for the same in the manner provided in said act.

And said act of 1895 contained other provisions similar in form, effect and substance as to the levying of said assessment and as to the sale of lands for unpaid assessments, to those hereinbefore recited and which were contained in and prescribed by chapter 550 of the Laws of 1893, hereinbefore referred to, including the specific provision that when any land was sold and conveyed to the purchaser, the deed of conveyance should be conclusive evidence that the proceedings are regular and valid, and in conformity to law, and that the proceeds of such sale should be applied on the payment of the fees and expenses of making the sale, and the remainder thereof to be applied to the payment of the amount of local assessment charged against the land sold, and the excess, if any, to the payment of all other taxes and assessments due and payable from the land or from the owner thereof, on account thereof, to the town.

11 And your orator further shows upon information and belief, that after the passage of said act, chapter 816 of the Laws of 1895, and after the same went into effect, on or about August 12, 1895, the supervisor, town clerk, justice of the peace, commissioner or commissioners of highways of said town of Tonawanda, constituting a board and acting under and by virtue of the provisions of said act, adopted and filed the assessment-roll and made a certified copy thereof and delivered the same to the defendant Patten who then and there was, and now is, supervisor of said town, duly elected, qualified, and acting, said assessment-roll being for the entire amount of the improvement of grading and paving said Delaware street and highway in 1893, corresponding in terms to the assessment-roll and list and statement made and recorded and filed by the town board of the said town of Tonawanda to raise the amount of such assessment for said improvement under the provisions of said chapter 5 0 of the Laws of 1893, as hereinbefore set forth, and in and by said assessment-roll the lots and parcels of land hereinbefore set forth, known as parcels Nos. 59 and 62, and which are owned by your orator as aforesaid, were assessed upon the basis of frontage in the manner prescribed by said chapter 550 of the Laws of 1893 and said chapter 816 of the Laws of 1895; that is to say, in and by said assessment, so much of the entire expense of the improvement of

grading and paving said Delaware street and highway, including interest on moneys borrowed by the issue and sale of said bonds hereinbefore described, and the expense pertaining to the making of said improvement, or the money borrowed for that purpose, by said town, which remained unpaid, was assessed on each of said lots and parcels of land in the same proportion to the entire expense locally assessed as the number of feet for which said lot or parcel of land bounded and fronted upon that part of the street in which the said improvement had been made, was to the aggregate number of feet of frontage or bounds subjected to the entire assessment, which
12 said assessment upon parcel No. 59, now owned by your orator, was $5,207.16, and on parcel No. 62 was $5,206.26.

And your orator further shows upon information and belief, that nothing has been paid upon said assessment upon each of said parcels of land, Nos. 59 and 62, and certain installments thereof have become due, and as they have not been paid within one year after the same became due, interest thereon at and after the rate of 1 per centum thereof for each month or fraction of a month, has also under the provision of said statute become due, and under the provision of the statute the entire assessment has become due, and the defendant John K. Patten, as supervisor of said town, has proceeded to advertise that he will, on the 14th day of September, 1899, at 10 o'clock in the forenoon of that day, in the corridor on the second floor of the post-office building, in the village of Tonawanda, Erie county, State of New York, expose for sale and sell at public auction to the highest bidder therefor, together with other parcels of land upon which said assessment is claimed to be a lien, the said lots and parcels of land Nos. 59 and 62, belonging to your orator as hereinbefore set forth, and that he, said Patten, such supervisor, claims that the amount of said assessment which will be due on said 14th day of September, 1899, being the amount of the principal of said assessment with interest added as aforesaid, will be on parcel No. 59, the sum of $7,929.30, and on parcel No. 62, the sum of $7,924.74, and unless restrained by the order of this court said defendant Patten, such supervisor, will, in the performance of his duty prescribed by said statutes, sell said parcels of land of your orator to the highest bidder, or purchase them himself in the name of said town, as provided in said act, and execute a deed of conveyance of said parcels of land, which is by the said act declared to be conclusive evidence that the proceedings were regular and valid and done in conformity of law, and said defendant Patten as such supervisor will apply thereby proceeds of any such sale of the parcels of land belonging to
13 your orator, and of the other parcels of land which will be sold on said sale under and by virtue of said assessment, in the manner prescribed by said act, and thereby authorized, to the payment of some or all of said bonds, or the interest accrued thereon, issued by said defendant The Town of Tonawanda, and sold to raise money to pay for said improvement.

And your orator further shows upon information and belief, that all the lands assessed for said improvement of grading and paving said Delaware street, such highway, hereinbefore set forth, were not

and are not benefited equally by the making of said improvement of grading and paving said street; that many of said lots and parcels are unequal in size and depth and of unequal value, and that under the terms and conditions and the rule and basis of levying said assessment, it was impossible for the boards and officers making said assessments to levy and apportion said assessments in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street, or in any other way, except in the arbitrary manner and method of assessing in such proportion to the entire expense assessed as the number of feet which any lot shall bound or front upon that part of the street in which the improvement shall have been made shall be to the aggregate number of feet of frontage or bounds to be subjected to the entire assessment, and that thereby, and unless the sale thereof be enjoined and restrained by the decree of this court, the lands and property of your orator hereinbefore mentioned will be taken for public use without just compensation, and your orator will be deprived of his said lands and property without due process of law, contrary to the provisions of the Constitution of the United States.

And your orator further shows, upon information and belief, that he is the owner in fee of certain other lands located in said town of Tonawanda, and which do not front on said Delaware street, such highway, and which have not been and cannot be, under the
14 terms of said statute, locally and specially assessed to pay for said improvement of grading and paving Delaware street, and which said lands are of the value of many thousands of dollars, and upon which your orator has been required to pay, and will hereafter be required to pay, all general taxes and assessments levied by said town of Tonawanda for the purpose of paying any and all indebtedness of said town of Tonawanda, which may become a charge upon the general fund and payable from the general tax levy of said town. That in and by the provisions of said chapter 816 of the Laws of 1895, the said defendant Patten as such supervisor is authorized, in case the highest sum which shall be bid by others for any parcel of land offered for sale be not sufficient to pay the assessment and interest, and the expenses of sale, and he shall regard it best for the town to do so, to purchase said lands, and take a certificate as such purchaser in the name of his town, and thereupon the amount of his bid shall be paid from the town funds, and for the purpose of acquiring moneys to pay the amount bid at any such sale, the town board of said town may authorize the said supervisor to borrow moneys upon the faith and credit of said town, and to issue notes, certificates of indebtedness or bonds for the same, and the proceeds of the sale of the real estate which may be purchased by the town as aforesaid, shall be applied to the payment of such notes and certificates of indebtedness or bonds as may be issued for that purpose, or the money necessary therefor may be raised by general assessment upon the property in the town in the discretion of the said board.

That as your orator is informed and believes, neither your orator

nor many other persons whose lands are to be sold under and by virtue of said assessment on the 14th day of September, 1899, by said supervisor, will bid in the same at said sale, and the highest sum which will be bid by any one for said parcels of land offered for sale will not be sufficient to pay the assessment and interest
15 and expenses of sale, and the said supervisor in order to pay the indebtedness of said town for said improvement and to pay the principal and interest on the bonds issued by said town as hereinbefore set forth to raise the money to pay for said improvement, threatens and intends to and will, unless enjoined and restrained by an order and decree of this court, purchase any and all of said parcels of land to be sold by him on said 14th day of September, 1899, under and by virtue of said assessment and under and by virtue of said acts of the legislature of the State of New York, in the name of the town, and the town board will authorize said supervisor to issue notes, certificates of indebtedness or bonds, and borrow money thereon upon the faith and credit of the town, for the purpose of paying the amount of the several assessments imposed by said assessment-roll upon the lands fronting on said Delaware street, such highway, where said improvement of grading and paving the same has been made, in accordance with the unconstitutional and unlawful provisions of said acts, and in order to repay the said moneys so borrowed, to pay the purchase price of said lands by said supervisor as aforesaid, the said board will levy and raise, by general assessment upon all the property in the town, the money necessary therefor, as provided in said chapter 816 of the Laws of 1895, and thereby, and by reason thereof, both the parcels 59 and 62 of your orator hereinbefore described, and the other lands of your orator in said town of Tonawanda, subject to general taxation, will be assessed unjustly and unequally and without reference or proportion to the benefits received from said improvement of grading and paving said Delaware street, such highway, and in case of non-payment of any such general tax, will be sold to pay the same, and thereby your orator will be deprived of his private property for public use without just compensation and will be deprived of his property without due process of law, in violation of the provisions of the Constitution of the United States, and thereby and by reason of the other acts threatened and in-
16 tended by the said defendants as hereinbefore set forth, your orator will suffer irreparable damage and injury for which he has no adequate remedy at law.

Your orator further shows upon information and belief, as the reason why he has not begun an action to restrain the sale of his said lands before this time, and for the other relief prayed for in this bill of complaint, that various suits and proceedings have been pending in the courts of the State of New York since the levying of said assessment, instituted by your orator and other persons for the purpose of setting aside said assessment-roll on various equitable grounds, amongst others, on the ground that the necessary number of consents of property-owners required by said statutes were not obtained, and from time to time various acts of the legislature of the State of

New York have been sought by your orator and other persons interested in said assessment, including the defendant The Town of Tonawanda itself, of which one of said acts has been passed by said legislature, but vetoed by the governor of the State of New York, which said acts were designed to amend and alter said unconstitutional acts of 1893 and 1895, and to provide an equitable, just and fair method of collecting said assessment, and by reason thereof and by an understanding between the authorities and representatives of said town and your orator, all proceedings in reference to said assessment have been suspended until the result of said suits in the said courts to set aside said assessment could be determined or until the legislature of the State of New York should make some new and further enactment in reference to said assessment. That all of said suits in said State courts have been determined adversely to your orator and the other persons interested therein, and in favor of the validity and regularity of said assessment-roll, and it has been found impossible to obtain from the legislature of the State of New York any relief act in the premises, and the lands of your orator have never been advertised for sale, nor has the supervisor of said
17 town, the defendant Patten, threatened to advertise the same for sale or to take active steps to enforce the collection of said assessment until on or before the 1st day of August, 1899.

Your orator further shows upon information and belief that in none of said actions in the State courts was the allegation made or litigated that the statutes, chapter 550 of the Laws of 1893, and chapter 816 of the Laws of 1895, were unconstitutional and void under the provisions of the Constitution of the United States, and that all of said suits have been discontinued.

Wherefore, your orator prays that the defendants may, if they can, show reason why your orator should not have the relief hereby prayed for, and that they make full disclosure and discovery of all the matters aforesaid and according to the utmost and best of their knowledge, information, and belief, full, true, direct and perfect answer make, to the matters and things heretofore stated and charged, and that the provisions of said chapter 550 of the Laws of the State of New York of 1893, and of chapter 816 of the Laws of the State of New York of 1895, requiring said assessment for said improvement of grading and paving Delaware street, a highway, to be apportioned so that so much of the expense of the improvement shall be raised from each separate lot or parcel of land as shall be in the same proportion to the entire expense locally assessed as the number of feet for which such lot shall bound or front upon that part of the street in which the improvement has been made, shall be to the aggregate number of feet of frontage or bounds subjected to the entire assessment, and also so much of the other provisions of said acts as are intimately connected with and dependent upon the said provisions of said acts, be adjudged and decreed to be contrary to the provisions of the Constitution of the United States and null and void. And that the defendants, their officers, agents and servants be, and each and every of them, enjoined and restrained from selling the property of your orator, parcels Nos. 59 and 62, for the

purpose of paying said proportion of the assessment levied on
18 said lots or parcels of land, under and by virtue of said acts, and that the defendant Patten as supervisor of the town of Tonawanda be enjoined and restrained from bidding in and purchasing at said sale, advertised to be held by him on the 14th day of September, 1899, the said lots and parcels of land owned by your orator, or any other lots and parcels of land, for the purpose of paying said assessment, and from borrowing any money to pay the purchase price thereof, or issuing any notes, certificates of indebtedness or bonds for the same, or from applying the proceeds of the sale of said lots and parcels of land assessed in said assessment-roll described in the complaint, to the payment of the principal or interest of any bonds issued for the purpose of paying for the improvement of grading and paving Delaware street as set forth in said complaint, and that said defendants be enjoined and restrained from the commission of any of said acts during the pendency of this action, or that your orator may have such other and further relief as the equity of this case may require, or as to your honors may seem meet and proper, together with the costs of this action.

May it please your honors also to grant unto your orator a writ of subpœna directed to the said defendants and each of them, commanding them on a day certain therein to be named, to appear and answer unto this bill of complaint, and to perform such order and decree in the premises as to the court may seem meet and may be required by the principles of equity and good conscience.

ROBERTS, BECKER, MESSER & GROAT,
*Solicitors for Complainant*, 403 *Main Street, Buffalo, N. Y.*

County of Erie, } ss:
*City of Buffalo,* }

James B. Lyon, being duly sworn, deposes and says that he is the complainant in this action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES B. LYON.

Subscribed and sworn to before me this 8th day of September, 1899.

L. F. THOMAS,
*Commissioner of Deeds in and for Buffalo, N. Y.*

Indorsed: Bill of complaint. Filed Sept. 9, 1899. W. S. Doolittle, clerk.

19

*Writ of Subpœna.*

The President of the United States of America to the Town of Tonawanda and John K. Patten, supervisor of the town of Tonawanda, Erie county, Greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States for the northern district of New York, in the second circuit, on the first Monday in October, 1899, to answer to a bill of complaint exhibited against you in said court by James B. Lyon, and to do further and receive whatever said court shall have considered in that behalf, and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of Utica, in said northern district, [L. S.] the ninth day of September, one thousand eight hundred and ninety-nine.

W. S. DOOLITTLE, *Clerk.*

ROBERTS, BECKER, MESSER & GROAT,
*Solicitors for Complainant.*

MEMORANDUM.—The defendant is to enter his appearance in the suit above mentioned, in the clerk's office, at Utica, on or before the day at which the above subpœna is returnable; otherwise the bill may be taken *pro confesso.*

W. S. DOOLITTLE, *Clerk.*

UNITED STATES OF AMERICA,
*Northern District of New York,* } ss:

I hereby certify that on the 13 day of September, 1899, at Tonawanda, in my district, I personally served the within writ of subpœna on the within-named defendants by showing the same to John K. Patten with the seal of the court thereon, and at the same time delivering to and leaving with him true copies thereof, being service for Town of Tonawanda, & on John K. Patten, as supervisor.

WM. R. COMPTON,
*U. S. Marshal.*
WM. H. WATTS, *Deputy.*

*Marshal's Fee.*

| | |
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| Service | $4.00 |
| Mileage | .90 |

Indorsed: Equity subpœna. Filed Sept. 20, 1899. W. S. Doolittle, clerk.

20 *Restraining Order.*

Circuit Court of the United States for the Northern District of New York. In Equity.

JAMES B. LYON, Complainant,
*vs.*
THE TOWN OF TONAWANDA and JOHN K. PATTEN, as Supervisor of the Town of Tonawanda, Erie County, Defendants.

On the bill in equity of the complainant above named, duly verified September 8, 1899, and filed on the 9th day of September, 1899, in the office of the clerk of this court, together with the affidavit of said complainant, likewise so verified and filed, and on motion of Mr. Tracy C. Becker, of counsel for the complainant, it is

Ordered, that the above-named defendants show cause before me at a term of above-named court to be held at the post-office building in the city of Buffalo, N. Y., on the 19th day of September,
21 1899, at 10 o'clock on that day, or as soon thereafter as counsel can be heard, why they and their officers, agents and servants should not be enjoined and restrained during the pendency of this action, from selling the property and lands of the complainant under a certain assessment for grading and paving Delaware street, in the town of Tonawanda, county of Erie and State of New York, now advertised to take place under the direction of the defendant Patten, on the 14th day of September, 1899, more fully set forth in said bill of complaint herein, and from selling said lots and parcels of land belonging to the complainant or any other lots or parcels of land, and bidding in and purchasing the same at said sale under said assessment for the purpose of paying said assessment, and from borrowing any money to pay the purchase price thereof, or issuing any notes, certificates of indebtedness or bonds for the same, or from applying the proceeds of the sale of any lots and parcels of land assessed in said assessment-roll described in the bill of complaint to the payment of the principal or interest of any bonds issued for the purpose of paying for the improvement of grading and paving said Delaware street, as set forth in the bill of complaint, or why this complainant should not have such other and further relief in the premises as may be just and proper.

It is further ordered, that in the meantime, and until the hearing and determination of said motion, and application for the injunction *pendente lite* under this order to show cause, said defendants are hereby restrained from selling the lots and parcels of land of the complainant on said sale advertised to take place on September 14, 1899, or from doing any other act or thing in reference to the sale of said complainant's lots and parcels of land under said assessment, except to adjourn said sale, so advertised to take place September 14, 1899, and that personal service upon the defendants of a copy of the bill of complaint herein and of the affidavit of the complainant and of the writ of subpœna issued out of this court, and of this

order to show cause if made on or before the 13th day of September, 1899, shall be deemed due and sufficient service thereof.

Utica, September 9, 1899.

(Signed) ALFRED C. COXE, *U. S. J.*

Indorsed: Order to show cause. Filed September 9, 1899. W. S. Doolittle, clerk.

22 United States Circuit Court, Northern District of New York.

JAMES B. LYON, Complainant,
*vs.*
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Defendants. } In Equity. No. 6778.

The defendants in the above-entitled suit make return to the order heretofore issued in this suit to show cause why an injunction should not be granted as therein more particularly specified and mentioned, enjoining and restraining these defendants from selling the lands of the plaintiff described in the bill of complaint, and levying and collecting and applying the moneys necessary to the payment of the bonds mentioned in the said bill of complaint, and for such cause allege and show:

First. That said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against these defendants touching the matters contained in the said bill, or any of the matters, and the said bill contained not any matter or equity whereon to sustain such writ of injunction as is sought and is prayed for in and by said bill.

Second. That it appears by said bill, as well as by the plea and affidavits on behalf of these defendants herewith presented and filed, that the complainant, and those with whom he is in privity of estate, have been guilty of such laches in bringing or prosecuting this suit and in the other particulars more particularly in the
23 accompanying demurrer specified as that it would be inequitable and unjust to entertain such bill or grant the relief prayed for.

Third. That the alleged illegality of the proceedings of the town board of Tonawanda, mentioned in the bill of complaint, and by reason whereof the complainant demands such injunction, are matters of record which must necessarily appear in any proceeding which may be taken to dispossess the complainant of his said lands.

Fourth. That the complainant has a full, complete and adequate remedy at law.

Wherefore, these defendants pray that the said order to show cause why an injunction should not be granted as aforesaid, be dismissed, and that they be given their costs and disbursements of the application.

JOHN CUNNEEN,
*Defendants' Solicitor, No. 85 West Eagle Street, Buffalo, N. Y.*

Indorsed: Return to order to show cause.

24 *Notice of Appearance.*

United States Circuit Court for the Northern District of New York.

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| JAMES B. LYON, Complainant, *vs.* THE TOWN OF TONAWANDA and JOHN K. Patton, as Supervisor of said Town, Defendants. | In Equity. No. 6778. |

The clerk of this court will please enter my appearance as solicitor for the defendants in the above-entitled cause.

Dated September 18th, 1899.

JOHN CUNNEEN,
*Solicitor for Defendants*, 85 *West Eagle Street, Buffalo, N. Y.*

Indorsed: Notice of appearance. Filed Oct. 2, 1899. W. S. Doolittle, clerk.

25 *Motion.*

United States Circuit Court, Northern District of New York.

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| JAMES B. LYON, Complainant, *vs.* THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Defendants. | In Equity. No. 6778. |

Now come the defendants herein and move the court for leave to withdraw from the files of this court the demurrer and plea filed herein on the 23rd day of September, 1899, and to file instead thereof the amended demurrer and plea herewith presented *nunc pro tunc* as of the said 23rd day of September, 1899, and that the clerk of this court be directed to withdraw said demurrer and plea first filed, as aforesaid, and to file the demurrer and plea herewith presented *nunc pro tunc* and as of the 23rd day of September, 1899, in the place and stead of the demurrer and plea first filed, as aforesaid.

The same to be without prejudice to any proceeding which has heretofore been had or taken in this cause.

26 *Order.*

At a term of the circuit court of the United States held in and for the northern district of New York, at Utica, on the 9th day of January, 1900.

Present: Hon. Alfred C. Coxe, judge.

JAMES B. LYON, Complainant.
*vs.*
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Defendants. } In Equity. No. 6778.

On this day the defendants' motion to be allowed to withdraw from the files of this court the demurrer and plea filed herein on the 23rd day of September, 1899, and to file instead thereof the amended demurrer and plea herewith presented *nunc pro tunc* as of the said 23rd day of September, 1899, and that the clerk of this court be directed to withdraw said demurrer and plea first filed, as aforesaid, and to file the demurrer and plea herewith presented *nunc pro tunc* and as of the 23rd day of September, 1899, in the place and stead of the demurrer and plea first filed, as aforesaid, the same to be without prejudice to any proceeding which has heretofore been had or taken in this case, came to be heard, and upon consideration the court—

Ordered the said motion to be, and the same hereby is, granted.

ALFRED C. COXE, *U. S. J.*

Indorsed: Motion and order to refile demurrer and plea. Filed Jan. 17, 1900. W. S. Doolittle clerk.

27 *Amended Demurrer and Plea.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON, Complainant.
*vs.*
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Defendants. } In Equity. No. 6778.

The Town of Tonawanda and John K. Patton, supervisor of said town, defendants jointly and severally by protestation, not confessing or acknowledging all or any of the matters and things in the bill of complaint of James B. Lyon, complainant, to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto and for cause of demurrer showeth:

1st. That the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against these defendants touching the matters contained in the said bill, or any of such matters, and the said bill contains not any matter of equity whereon to sustain such writ of injunction as is sought and is prayed for in and by the said bill.

2nd. That it appears in and by said bill that the complainant has been guilty of such laches in bringing and prosecuting this suit as that it would be inequitable and unjust to entertain said bill or grant the relief prayed for.

3rd. That the complainant, and those with whom he is in privity of estate, are guilty of laches in not appearing on the return of the

notice given pursuant to section 1 of chapter 550 of the Laws of the State of New York of 1893, and objecting to said improvement upon all or any of the grounds or objections thereto, mentioned in the bill of complaint herein.

4th. That the complainant, and those with whom he is in privity of estate, are guilty of negligence in not appearing on the return day mentioned in the notice, mentioned in section 6 of chapter 550 of the Laws of the State of New York of 1893, and objecting to said assessment upon all or any of the grounds mentioned in the bill of complaint herein.

5th. That the complainant, and those with whom he is in privity of estate, are guilty of negligence in not having appeared on the return of the notice, mentioned in section 44 of chapter 816 of the Laws of the State of New York of 1895, and made all or any of the objections to said assessment, which are mentioned in the bill of complaint herein.

6th. That the complainant, and those with whom he is in privity of estate, are guilty of negligence in not having applied to the town board of the town of Tonawanda for relief upon all or any of the grounds upon which the complainant conceives himself to be entitled thereto, against the said assessment because of any of the matters or things in the bill of complaint herein alleged, pursuant to section 53 of chapter 816 of the Laws of the State of New York of 1895.

7th. That the complainant, and those with whom he is in privity of estate, are guilty of laches in not having taken the proceedings at law to review the assessment complained of, pursuant to section 46 of chapter 816 of the Laws of the State of New York of 1895.

8th. That the complainant, and those with whom he is in privity of estate, are guilty of laches in not having taken the proceedings at law authorized by chapter 16, title 2, article 7 of the Code of Civil Procedure of the State of New York.

9th. That the complainant, and those with whom he is in privity of estate, are guilty of laches in not having litigated the validity of chapter 550 of the Laws of the State of New York of 1893 or chapter 816 of the Laws of the State of New York of 1895, or their constitutionality in the suit in the supreme court of the State of New York, which he alleges in his bill he heretofore instituted.

10th. That the complainant has had, and has now, complete, full and adequate remedies at law for all the alleged grievances in the bill of complaint mentioned or referred to.

11th. That the defects and illegalities in the said assessment, mentioned in the bill of complaint, are each and all matters of record which will necessarily appear in any proceeding which may be instituted to dispossess the complainant, or his grantees, of the lands or premises mentioned in the bill of complaint, or of any part of said lands or premises by reason of the said assessment in the bill of complaint mentioned.

12th. That there is a defect of parties complainants or defendants, which appears upon the face of the bill, in that it appears that there are others whose property was assessed in the same proceeding in

which this complainant was assessed, and that the defendants are subject to a multiplicity of suits by all of said persons so assessed, unless such persons are made parties to this suit.

28 That it also appears by the bill that the bonds of the said town have been sold and are held by persons not parties to this suit, and that the rights of said bondholders to payment of said bonds will be affected by any decision of this honorable court which may restrain or enjoin the defendants in this action from taking the proceedings which are prescribed by the laws of the State of New York to obtain the moneys necessary for the payment of said bonds, and for this reason, as well as that the defendants are subject to a multiplicity of suits for the enforcement of the said bonds by the various holders of said bonds, such holders should be made parties to this suit.

13th. That it appears by the face of the bill of complaint that expenses have been incurred and all rights have become vested in the long period of time which has elapsed since the said improvement and assessment were made, and in which the plaintiff and his predecessors in title have neglected to take any of the various proceedings hereinbefore mentioned to correct or annul the said assessment, and during which time the complainant and his predecessors in interest have neglected and omitted to invoke the aid of the court or seek relief in equity against said assessments, and that by reason of the premises it would be inequitable and unjust to grant the relief which the complainant now seeks.

Wherefore, and for divers other good causes of demurrer in the said bill contained, these defendants do demur and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to said bill of complaint;

29 and these defendants, jointly and severally, not waiving their said demurrer, but relying thereon and saving and reserving unto itself and himself all benefits and advantage of exception to the many errors and uncertainties and other imperfections in said bill contained—these defendants for plea thereto saith:

First. They deny that it was impossible for the boards and officers making said assessment to levy and apportion said assessment in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street, and allege that the provisions of the statute aforesaid in that regard only required that the said boards and officers should assess the expense of said improvement upon the lots fronting or bounding on both sides of that part of the highway on which the improvement was made, and that the said boards and officers were free to and that it was their duty under the provisions of said statute to assess said expense upon said several lots or parcels of land in proportion to the benefit which each of them derived by the making of said improvement.

Second. And further plead that after the enactment of chapter 550 of the Laws of the State of New York of 1893 in the bill referred to, and on or about the 3rd day of July, 1893, the Columbia Land Company, a corporation organized under and pursuant to the laws

of the State of New York, was the owner in fee of the lands and premises described in the bill of complaint and now belonging to the complainant, whose title is derived as follows, viz:

30 On October 5, 1891, the legal title to the lands on Delaware street described in the complaint was conveyed by one Wire and others to William F. Sheehan in trust for himself and for the plaintiff Lyon and one Defreest, and on said day said Sheehan executed and delivered to his grantors to secure the payment of part of the purchase price of said lands three mortgages thereon, which were duly recorded on or about said day in the office of the county clerk of Erie county, N. Y.; that thereafter and on December 29, 1892, said Sheehan sold and conveyed said lands to one Hulbert, taking back from said Hulbert a mortgage for part of the purchase price, which was also duly recorded in said clerk's office at or about the time the same bore date, which said mortgage was held by said Sheehan until September 17, 1897; that on January 24, 1893,

31 said Hulbert sold and conveyed said lands to the Columbia Land Company; that thereafter and on or about the 7th day of September, 1897, in an action in the supreme court, Erie county, in which the owners and holders of the three purchase-money mortgages executed and delivered by said Sheehan to his grantors on October 5, 1891, as first hereinafter mentioned, were plaintiffs and said Sheehan and all other parties interested in said lands subsequent to said mortgages, including the said Columbia Land Company, were defendants, said three purchase-money mortgages were foreclosed and a judgment of foreclosure and sale entered, and on same day and by virtue of said judgment said lands were sold by referee duly appointed in said action of foreclosure and conveyed to said Sheehan, Defreest, and Lyon, and thereafter and before the commencement of this action the interests of said Sheehan and Defreest therein were transferred to the plaintiff Lyon, who at the time of the commencement of this action was the owner and holder of the whole legal title thereto.

That on the said third day of July, 1893, the said Columbia Land Company, then being the owner of said lands, as aforesaid, subject to said mortgages, filed with the town board of the town of Tonawanda a written petition, signed by the said corporation and other owners of property fronting and bounding on that part of the Delaware street or road improved, as mentioned in the bill of complaint, wherein the said signers petitioned the said board to order said part of said road or street to be paved forty (40) feet in width, "pursuant to the provisions of chapter 550 of the Laws of 1893 authorizing the paving of streets in the town of Tonawanda."

32 That thereupon and on said 3rd day of July, 1893, the town board of the town of Tonawanda initiated the proceedings mentioned in said petition, in the form specified in said statute.

That by section 1 of chapter 550 of the Laws of New York of 1893 the town board of the town of Tonawanda were required to give notice and a hearing to all persons interested in said improvement before determining to make the same. Reference is hereby made to said statute for greater certainty as to its form and requirements.

That the said board upon filing said petition and adopting a resolution proposing to make said improvement did give said notice, and designated therein a time and place within said town when the board would meet to hear all persons interested in said improvement who should appear pursuant to said notice or otherwise to make such objections as they might have to such improvement, and that the board aforesaid met at the time and place mentioned in said notice, but that neither the complainant nor any person with whom he is in privity of estate appeared before the said board at the time and place aforesaid or made any of the objections to the said improvement or to the said statute or to its validity which are mentioned in the bill in this suit, or any of said objections whatsoever, and that thereupon the town board determined to make said improvement; that section 4 of the statute last mentioned provided that said determination to make said improvement should have "no force or effect until the consent in writing shall be obtained of the owners of at least one-half of the actual feet frontage of land on each side of any highway ordered as aforesaid to be improved, excepting therefrom the space occupied by highways crossing the same."

33 That afterwards, and on or about the 19th day of July, 1893, the said Columbia Land Company then being the owner in fee of the lands and premises now owned by the complainant in this action as alleged in the bill, the said lands being then subject to the said mortgages, as aforesaid, there was filed with the town board of the town of Tonawanda another writing, wherein it was recited that the town board had "in pursuance of chapter 550 of the Laws of 1893 duly ascertained and determined the expense" of the improvement, and "having duly met and heard all objections offered by any party interested in said improvement, and said board having thereupon and on the 25th day of July, 1893, duly ordered and determined" to make said improvement, further continued as follows:

"Now, therefore, in pursuance of section 4 of said chapter 550 of the Laws of 1893, we, the undersigned, being the owners of more than one-half of the actual feet frontage on each side of said highway to be improved as aforesaid (excepting therefrom the space occupied by highways crossing the same), do hereby consent to

34 said improvement as ordered, hereby ratifying and confirming the action of said town board in the regard mentioned."

Which last-mentioned written instrument so filed as aforesaid with the town board was signed by the said corporation Columbia Land Company by its proper officer, and by numerous other persons and corporations owning lands fronting and bounding on that part of the street or highway aforesaid improved as aforesaid. And that thereupon, and on the 29th day of July, 1893, upon receiving and filing the written consent of property-owners last mentioned, the town board of the town of Tonawanda determined that the consent in writing of the owners of at least one-half of the actual feet frontage of the land on each side of the highway ordered as aforesaid to be improved, excepting therefrom the spaces occupied by the highways crossing the same, had been obtained, and in view thereof, resolved and determined that the improvement be made, and that

bonds of the town of Tonawanda to the amount of $232,600 be issued by said town for the purpose of obtaining money to make said improvement, and that such bonds be sold for that purpose and the moneys used in making said improvement, and that said bonds were so issued and sold and the moneys realized from the sale of said bonds were used in making said improvement petitioned for and consented to by the Columbia Land Company as aforesaid, which improvement and bonds are the same improvement and bonds mentioned in the complainant's bill in this suit.

Thereupon the town board of the town of Tonawanda proceeded in the manner and form specified in said chapter 550 of the Laws of New York of 1893 to assess the moneys necessary to pay said bonds upon the said parcels of land fronting and bounding upon that part of the said street or highway improved as aforesaid.

That pursuant to section 6 of chapter 550 of the Laws of 1893, the said town board caused the list of said lots or parcels of land, mentioned in the said bill, to be made and filed, and that thereupon the notice, prescribed by said section 6 in said statute, was given to all persons interested, that the said board would meet at a time and place which were specified therein, to hear all objections, which should be made to said list or assessment, and that at the time and place specified in and by said notice the said town board did meet to hear and consider such objections, but that neither the said Columbia Land Company, nor the complainant, nor any person in privity of estate, or either of them, appeared or made any objections to the said list. That thereupon the said list was, as alleged in the bill, affirmed and filed, and a copy thereof delivered to the supervisor of the town of Tonawanda, William J. Rogers, who was the predecessor of the defendant Patton, as supervisor of said town; that the said supervisor proceeded to collect said assessments and to apply the same in payment of principal and interest as the same became due, pursuant to the provisions of said bonds, and did threaten to advertise and sell such lands, so assessed as aforesaid, as should be necessary to raise the moneys necessary to pay said bonds, and that the supervisor of said town for the time being continued to make collections of the installments of said assessments until on or about the 29th day of May, 1895, when chapter 816 of the Laws of the State of New York of 1895 was approved by the governor and became of force, and that thereupon the town board of the town of Tonawanda proceeded to reassess the moneys necessary to pay said bonds as aforesaid, pursuant to the direction contained in section 27 of the statute last mentioned.

That the said board caused an assessment-roll to be made and filed, as mentioned in the bill, and pursuant to section 44 of the statute last mentioned the said town board caused notice to be published that at a time and place, which were specified therein, the board would meet and hear and consider any objections which might be made to the said roll, and that at the time and place, which were so specified in said notice, the said board did meet and heard and considered such objections as were made to the said assessment-roll, and did consider and act on all such objections as

were made to the same, and that neither the complainant in this suit, nor any person with whom he is in privity of estate, appeared before the said board at said time and place or made any of the objections mentioned in the bill of complaint, or any objections whatsoever, to the said assessment-roll, or to the said assessment.

That thereupon, and on or about the 12th day of August, 1895, the said board affirmed the said assessment-roll, and that thereupon the said assessment-roll was filed and delivered for collection, being the same assessment-roll mentioned and described in the bill herein.

And that thereupon the supervisor of the town of Tonawanda accepted the said assessment-roll and assumed the collection of said assessments, and that the assessment made under and pursuant to the provisions of chapter 550 of the Laws of 1893, as aforesaid, was abandoned.

That under and pursuant to the provisions of section 46 of chapter 816 of the Laws of 1895, aforesaid, any person interested who shall have appeared before the town board and made his objections at any hearing provided for in that statute, and who shall consider himself aggrieved by the action of the board, may within twenty days thereafter have a writ of certiorari for a review of the decision or action of the board in the supreme court of the State of New York pursuant to the general procedure of that court.

And these defendants allege and show, that neither the complainant in this action, nor any person with whom he is in privity of estate, took any action whatsoever under that part of the statute last mentioned for the review of any of the said decisions of the town board of the town of Tonawanda upon any ground mentioned in the bill herein, or upon any other account whatsoever.

These defendants further allege and show upon information and belief that by article 7, title 2, chapter 16 of the Code of Civil
37 Procedure of the State of New York, the supreme court of the State of New York has and during all the times mentioned herein has had jurisdiction and power in proceedings at law to review every order or determination of the town board of the town of Tonawanda which was made under and pursuant to the provisions of either of said statutes, and these defendants allege that the complainant in this suit did not, nor did any person with whom he is in privity of estate, take any proceedings at law whatsoever under or pursuant to the said article 7, title 2 of chapter 16 of the Code of Civil Procedure, to review any of the orders or determinations which were made by the town board of the town of Tonawanda under or pursuant to the provisions of statutes of 1893 and 1895, or of either of them.

These defendants further show that no action at law, or suit in equity, was commenced in the State, or other courts, for the purpose of setting aside said assessment-roll on any ground whatsoever, or for any other relief or judgment concerning the same until on or about the 5th day of February, 1896, when a suit was instituted by the service of a summons and complaint by Joseph T. Jones, the owner of a parcel of land included in said assessment, in the supreme

court of the State of New York for the purpose of having said assessments adjudged illegal and void and of enjoining the enforcement of the said assessments. That no application for an injunction *pendente lite*, restraining the said supervisor or enjoining him from collecting said assessments, was made in that suit until on or about the 22d day of August, 1896, when notice of an application for such an order was served in the said case of Joseph T. Jones against the said town; that until that motion was noticed as aforesaid no arrangement, agreement or understanding of any name or nature whatsoever was made by the said town, or by any person on its behalf, that any proceedings in reference to said assessment should be suspended until the result of the said suit, or any other suit in said court, or any other court, could be determined, or until the legislature of the State of New York should make some new or further enact-
38 ment in reference to said assessment, but that the said successive supervisors of the town of Tonawanda were endeavoring to collect said assessments, and that the defendant Patton, as such supervisor, was about to advertise the lands, the owners of which had made default in payment of said assessments, including the lands of the plaintiff in this action, for sale to pay said assessments when said motion for said injunction *pendente lite* was noticed in said Jones case aforesaid.

That this complainant did not commence any suit in the supreme court of the State of New York, or elsewhere, to have said assessments declared illegal or void, or to restrain or enjoin the collection of them, or either of them, until on or about the [illegible] day of March, 1899.

That a large number of suits were commenced by owners of property assessed as aforesaid, and persons interested therein, in the supreme court of the State of New York for the purpose of having said assessments adjudged void and of enjoining the enforcement thereof, but that all of said suits have been dismissed by the supreme court of the State of New York, most of them because the plaintiffs in each of said suits were not prepared to proceed to trial when the cases were reached and the trial thereof moved by these defendants.

These defendants further allege and show, that two installments of principal and interest, which became due and payable on said bonds in 1894 and 1895, have been paid; that certain of the owners of property assessed for the improvement as aforesaid have made all payments which have become due on their assessments; that the defendant, The Town of Tonawanda, has raised by general tax the moneys necessary to pay a part of the said two installments of 1894 and 1895, which payments were made before any suit at law or in equity was commenced to have said assessments adjudged void, or to restrain or enjoin the collection of them. That all of said bonds have been sold, and some of them have been resold, and that many of them are owned by savings banks, representing trust
39 funds, and a large number of them are owned by the State of New York, and that said bonds were acquired by the State and by said banks and trust companies before any suit or litigation was instituted or commenced, adjudging or questioning in any

manner the validity of said statutes or of said assessments or of said bonds.

That the complainant and his predecessor in interest and all others interested as owners, and otherwise, in the lands so assessed, have been guilty of laches in not making or asserting any claim that said assessments or proceedings, or the statutes under which they were taken, or the said bonds, were void or illegal, as hereinbefore more fully specified, until investments have been made and proceedings have been taken and interests have become vested as above mentioned in reliance on the validity of said statutes and proceedings, which it would be inequitable and unjust to now disturb, and which proceedings would not have been taken, which investments would not have been made and which rights would not have become vested, had not the Columbia Land Company and others filed the said petition and consent with the town board of the town of Tonawanda and induced it to take the proceedings in making the improvement and the assessment, and issuing and selling the bonds aforesaid.

Third. That there are eighty-four (84) separate parcels of real estate included in said assessment-roll. The owners and persons interested in most of these parcels are residents of the State of New York and within the jurisdiction of this court. The defendants are subject to separate suits by the owners and persons interested in each of said parcels. The owners of said bonds are, so far as known to these defendants, within the State of New York and the jurisdiction of this court. The rights of the owners of these bonds must necessarily be affected by any order or decision which may be made in this suit pursuant to the prayer of the bill, as it is sought to restrain and enjoin the defendants in this action from raising the moneys necessary to pay the said bonds, principal or interest.

40 These defendants are also subject to suits by the different owners of these bonds for their enforcement, and the State of New York, by its comptroller and attorney general, has already threatened to commence proceedings, either by action at law or mandamus, to compel the payment of the interest and of that part of the principal of the bonds now owned by the State which has become due and is payable.

And these defendants allege that the complainant should not be allowed to have or maintain this suit unless the owners of all lands so assessed as aforesaid and the owners of said bonds be made parties to this suit. That all controversies concerning the subject-matter of this suit be determined and adjudged.

And these defendants humbly pray the judgment of this honorable court whether they, or either of them, shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their reasonable costs in this bill sustained.

JOHN CUNNEEN, JOHN K. PATTON.

*Solicitor and of Counsel for Defendants,*
*85 West Eagle Street, Buffalo, N. Y.*

I certify that in my opinion, the foregoing demurrer of the defendants to a part of the bill of complaint of James B. Lyon, complainant, is well founded in law and proper to be filed in the above cause.

JOHN CUNNEEN,
*Solicitor and of Counsel for Defendants,*
*85 West Eagle Street, Buffalo, N. Y.*

UNITED STATES OF AMERICA,
*Northern District of New York, County of Erie, City of Buffalo,* } ss:

John K. Patton, being duly sworn, does depose and say, that he has read the foregoing demurrer to a part of the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein, and doth further say that he is one of the defendants named in the foregoing plea subscribed by him; that he is the chief officer of the defendant, The Town of Tonawanda, to wit, the supervisor thereof; that he has read the foregoing plea and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true.

JOHN K. PATTON.

Subscribed and sworn to before me, this 30th day of December, 1899.

[SEAL.] WM. W. HAMMOND,
*Notary Public.*

Indorsed: Amended demurrer and plea. Filed Jan'y 17, 1900, *nunc pro tunc*, as of September 23, 1899. W. S. Doolittle, clerk.

41 *Interlocutory Judgment on Demurrer.*

Circuit Court of the United States, Northern District of New York.

JAMES B. LYON, Complainant,
*against*
THE TOWN OF TONAWANDA and JOHN K. PATTON, as Supervisor of the Town of Tonawanda, Erie County, Defendants. } In Equity. No. 6778.

The issues raised by the demurrer and plea of the defendants above named to the bill of complaint of the above-named complainant having come on to be tried at the September term of this court, held at the city of Buffalo, in the county of Erie, in the district aforesaid, and having been tried upon said pleadings and upon the stipulation between the respective parties, filed in the office of the clerk of this court on the 2nd day of November, 1899, and after hearing Mr. Tracy C. Becker, of counsel for complainant, and Mr. John Cunneen, of counsel for the defendants, this court having rendered and filed its decision overruling said demurrer and plea, it is—

Ordered and adjudged that the demurrer and plea of the defendants to the bill of complaint herein be, and they hereby are, overruled and judgment directed for the complainant for the relief demanded in his bill of complaint, with costs to the complainant, but with leave, however, to the defendants to answer over to
42 the bill of complaint within twenty days after the entry of this order and judgment on payment of costs.

January 17th, 1900.

ALFRED C. COXE, *U. S. J.*

Indorsed: Interlocutory judgment on demurrer. Filed Jan. 17, 1900. W. S. Doolittle, clerk.

43 Circuit Court of the United States, Northern District of New York.

JAMES B. LYON, Complainant,
*against*
THE TOWN OF TONAWANDA and JOHN K. Patton, as Supervisor of the Town of Tonawanda, Erie County, Defendants. } In Equity. No. 6778.

An order to show cause why a preliminary injunction should not be continued during the pendency of this action granted herein on the 9th day of September, 1899, having come on to be heard at the September term of this court, held at the city of Buffalo, in the county of Erie and district aforesaid, upon the bill of complaint herein, filed in the office of the clerk of this court on the 9th day of September, 1899, and upon the writ of subpœna issued thereon, and upon the demurrer and plea of the above-named defendants to the said bill of complaint, and upon the affidavit of James B. Lyon, verified the 8th day of September, 1899, and filed with said bill of complaint on the 9th day of September, 1899, in said clerk's office, and upon the affidavits of John Cunneen, verified September 22nd, 1899, and John K. Patton, verified on said day, and on the return to the order to show cause subscribed by defendants' solicitor, and upon the stipulation of the attorneys for the respective par-
44 ties, filed in said clerk's office on the 2nd day of November, 1899, and having heard Mr. Tracy C. Becker, of counsel for the complainant, and Mr. John Cunneen, of counsel for the defendant-, it is—

Ordered that the injunction order granted on said 9th day of September, 1899, with said order to show cause, restraining the defendants from selling the lots and parcels of land of the complainant, or from doing any other act or thing in reference to the sale of the complainant's lots and parcels of land under the assessment referred to in the bill of complaint in this action be, and the same hereby is, continued during the pendency of this action, except that said sale may be from time to time adjourned until the entry of a final decree herein.

Jan. 17, 1900.

ALFRED C. COXE, *U. S. J.*

Indorsed: Order continuing injunction. Filed Jan. 17, 1900. W. S. Doolittle, clerk.

45 *Answer.*

United States Circuit Court, Northern District of New York.

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| JAMES B. LYON, Complainant, *vs.* THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Erie County, Defendants. | In Equity. | No. 6778. |

The defendants, The Town of Tonawanda and John K. Patton, supervisor of said town, jointly and severally, not waiving their demurrer and plea filed herein, but reserving and saving to themselves and each of them all benefit and advantage by reason of them and of each of them, for answer to so much of the bill of complaint in this suit as they are advised it is material or necessary to make answer to, and now and at all times saving to himself and itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said bill contained, say:

First. They and each of them admit that the town board of the said town made the improvement and the assessment and issued the bonds, and that the supervisor at the commencement of this suit was taking the proceedings for sale of the lands and premises described in the bill mentioned in the bill, and that each and all of said proceedings were taken in compliance with and in conformity to chapter 550 of the Laws of the State of New York, passed in the year 1893, and with chapter 816 of the Laws of the State of New York, passed in the year 1895, and that over two hundred thousand dollars
46 of the indebtedness mentioned in the bill of complaint, incurred for the purpose of making said improvement, still remains unpaid, and that a large part thereof has become due.

They deny that said act of 1895 prescribed that so much of the expense of the improvement should be raised from each separate lot or parcel of land as shall be in the same proportion to the entire expense, locally assessed, as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made shall be to the aggregate number of feet of frontage or bounds to be subjected to the entire assessment.

They also deny "that under the terms and conditions and the rule and basis of levying said assessment it was impossible for the boards and officers making said assessments to levy and apportion said assessments in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street," and beg leave to submit the said statute and every part thereof to this honorable court upon the hearing of this case, that proper construction thereof may be given by the court.

They deny that because of the provisions of either of said statutes or for any reason, unless the sale of said lands be enjoined and re

strained by the decree of this court, that the complainant will be deprived of his land and property without due process of law or contrary to the provisions of the Constitution of the United States.

While they admit that the expense of the improvement was assessed so much thereof upon each parcel of land fronting or bounding upon the street as was in the same proportion to the entire expense that the number of feet for which it bounded or fronted on the improvement was to the entire number of feet of frontage or
47 boundaries on each side of that part of the street improved, they deny that said method was an arbitrary manner or method of assessing the same, because in following said method, as aforesaid, they obeyed the mandate of said statute, and on that behalf they allege and aver upon their information and belief that that rule of apportionment was adopted and authorized by the legislature of the State of New York with reference to, after inquiry into, and upon consideration and determination of the benefits which the improvement authorized and made conferred upon the said lands, which inquiry, consideration, and determination appears by the statutes aforesaid and by each of them, and that the legislature of the State of New York, under the constitution of that State, as frequently interpreted by its highest courts, had and now has the power and capacity to prescribe such rule for apportioning expense of local improvement as will in its judgment best result in apportioning to each parcel of land assessed that part of the expense which shall be in proportion to the benefit conferred by the improvement.

And further allege and aver that said determination made by the legislature and evidenced by the said statutes and by each of them bars and precludes the complainant from asserting or claiming that said assessment is not made upon the complainant's lands in proportion to the benefits which they derived by the making of said improvement; and they crave leave to submit the said statutes and each and every part of them to this honorable court, that the same may be properly construed in that regard.

Second. And, to avoid expense and prolixity, the defendants and each of them, as a part of this their answer, here repeat the first, second, and third paragraphs of their pleas filed herein, and crave leave that at all times reference be had to the same for greater certainty as to their contents.

48 All which matters and things these defendants and each of them are ready and willing to aver and maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JOHN CUNNEEN,
*Solicitor & of Counsel for Defendants,*
85 *West Eagle Street, Buffalo, N. Y.*

UNITED STATES OF AMERICA,
*Northern District of New York, County of Albany,* } ss:
*City of Albany,*

John K. Patton, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN K. PATTON.

Subscribed and sworn to before me this 17th day of January, 1900.

JAS. W. BENTLEY,
[L. S.] *Notary Public, Albany Co., N. Y.*

UNITED STATES OF AMERICA,
*Northern District of New York, County of Erie,* } ss:
*City of Buffalo,*

James B. Huff, being duly sworn, deposes and says that he is the principal officer of the defendant The Town of Tonawanda, to wit, the supervisor thereof, having recently succeeded the said John K. Patton as such, and having qualified and entered upon the discharge of his duties; that the foregoing answer is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JAMES B. HUFF.

Subscribed and sworn to before me this 16th day of January, 1900.

WM. W. HAMMOND,
[L. S.] *Notary Public.*

Indorsed: Answer. Filed Jan'y 17, 1900. W. S. Doolittle, clerk.

49 *Decree.*

At a term of the United States circuit court held in and for the northern district of New York, at the city and county of Albany, in said district, on the 17th day of January, 1900.

Present: Hon. Alfred C. Coxe, district judge.

Circuit Court of the United States, Northern District of New York.

JAMES B. LYON, Complainant,
*vs.*
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Erie County, Defendants. } In Equity. No. 6778.

This cause came on to be heard at this term and was argued by counsel, Mr. Tracy C. Becker appearing as counsel for the plaintiff

and Mr. John Cunneen as counsel for the defendants, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

That those parts of the acts of the legislature of the State of New York mentioned and set forth in plaintiff's bill of complaint, to wit, of chapter 550 of the Laws of the State of New York for the Year 1893 and of chapter 816 of the Laws of the State of New York for the Year 1895, which authorize and require the town board of said town to levy the assessment for the entire expense of paving said Delaware street, set forth in the bill of complaint, upon the complainant's said parcels of land described in said bill of complaint and the other lands fronting on said Delaware street, and the acts of said defendant, The Town of Tonawanda, by its town board, mentioned in said bill of complaint, in levying said assessments upon said lands according to the rule prescribed in said acts of said legislature, to wit, in the proportion which the number of front
50 feet of each of said lots and parcels of land bounding and fronting on said Delaware street in front of which said improvement of paving said street was made and which are assessed therefor in and by said assessment bear and are to the aggregate number of feet of frontage of all the lots of land so bounding on the portion of said street in front of which said improvement was made, was and were, and each and every of said provisions of said acts of the legislature of the State of New York and all the acts of said defendant, The Town of said Tonawanda, in levying said assessment in the manner and form aforesaid are, wholly unconstitutional and void as being contrary to the provisions of the Constitution of the United States; and it is further—

Ordered, adjudged, and decreed that the acts of the defendant The Town of Tonawanda and of the defendant Patton, as supervisors of said town, in threatening and endeavoring to advertise and sell the plaintiff's said lands under and by virtue of said assessments were, and they are, unlawful and threaten and will work irreparable injury to the plaintiff and his said lands, for which he has no adequate remedy at law; and it is further—

Ordered, adjudged, and decreed that the said defendant, The Town of Tonawanda, and the defendant John K. Patton, as such supervisor of said town, and his successors and their agents, servants, and attorneys be, and they and each and every of them hereby are, forever enjoined and restrained from advertising for sale or selling any of said complainant's said lands under and by virtue of said assessments described in the complaint, and from in any manner collecting or enforcing payment of such assessments against said complainant or his lands or property or threatening or advertising so to collect or enforce the same, and that the said complainant do recover of said defendants, jointly and severally, his costs in this action, amounting to $55.65, and that the complainant have execution therefor accordingly

ALFRED C. COXE, *U. S. J.*

Indorsed: Decree. Filed Jan'y 17, 1900. W. S. Doolittle, clerk.

51 And the costs having been taxed by the clerk at fifty-five dollars and sixty-five cents, the process, pleadings, and decrees, together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said James B. Lyon recover of said The Town of Tonawanda and John K. Patton, supervisor of the town of Tonawanda, Erie county, as adjudged in said final decree, the cost and charges as taxed, the sum of fifty-five dollars and sixty-five cents.

Signed and enrolled, pursuant to the rules and practice of this court, this seventeenth day of January, A. D. 1900, at three o'clock n the afternoon.

W. S. DOOLITTLE, *Clerk.*

Endorsement on cover: In equity. No. 6778. United States circuit court, northern district of New York. James B. Lyon *vs.* The Town of Tonawanda and John K. Patton, supervisor of the town of Tonawanda, Erie county. Final record. Roberts, Baker, Messer & Groat, complainant's solicitors. Costs, 855.65; total, 855.65. Filed and entered the 17 day of January, 1900, at 3 p. m. W. S. Doolittle, clerk.

52 *Affidavit of Complainant.*

Circuit Court of the United States for the Northern District of New York.

JAMES B. LYON, Complainant,
*vs.*
THE TOWN OF TONAWANDA and JOHN K. PATTEN, Supervisor of the Town of Tonawanda, Erie County, Defendants. } in Equity.

STATE OF NEW YORK, *County of Erie, City of Buffalo,* } *ss:*

James B. Lyon, being duly sworn, says that he resides in the State of New York, in the city and county of Albany, and that he is of full age and a citizen of the United States and of the State of New York; that he is the plaintiff in the above-entitled action, and the owner in fee of the premises described in the complaint; that he has read the complaint herein, verified the same, and he hereby makes said complaint a part of this affidavit; that the sources of deponent's information and belief as to the matters and things alleged in said complaint upon information and belief are the

53 records on file in the office of the town clerk of the defendant The Town of Tonawanda, the printed advertisement of sale of the assessment-roll set forth in the complaint of the parcels of land therein described in the Tonawanda News, a newspaper published in the town of Tonawanda, Erie county, New York, on August 1, 1899, and the record and proceedings in the case in the supreme court of the State of New York of Joseph T. Jones against The Town of Tonawanda and John K. Patten as supervisor of the said town of Tona-

wanda, now on file in the office of the county clerk of Erie county, and statements made to deponent by John Cunneen, Esq., attorney and counselor at law, of Buffalo, N. Y., who acted as counsel for said town and for said supervisor, the defendants in said action of Jones against The Town of Tonawanda, and who is now acting as counsel and adviser to the town board of said town of Tonawanda, and the defendant Patten as supervisor of said town. Deponent further says that the next term of the circuit court of the United States in and for the northern district of New York convenes at the city of Buffalo, N. Y., on the 19th day of September, 1899; that the sale under the unlawful and unconstitutional assessment set forth in the bill of complaint herein on deponent's lands in said town of Tonawanda, is advertised to take place on the 14th day of September, 1899, and that unless said sale is stayed and enjoined until the further order of this court, it is the intention of defendants to proceed with said sale and to do and perform the other acts complained of in said bill of complaint, as they and their counsel have admitted to deponent.

That no other application for any injunction order has been made to any other court or judge and refused.

Wherefore, deponent prays that an order be granted and directed to be served with the writ of subpœna, bill of complaint and this affidavit upon the defendants, granting a temporary injunction and stay of proceedings and said sale, except to adjourn the same,
54 until the 19th day of September, 1899, at the opening of court at Buffalo, N. Y., on that day, or such other time and place as the court may fix, and that said defendants be directed to show cause at said time and place why the said injunction and stay of proceedings on said sale should not be continued during the pendency of this action.

JAMES B. LYON.

Subscribed and sworn to before me, this 8th day of September, 1899.

L. F. THOMAS,
*Commissioner of Deeds in and for Buffalo, N. Y.*

Indorsed: Affidavit. Filed September 9, 1899. W. S. Doolittle, clerk.

55 *Affidavit of John Cunneen.*

United States Circuit Court, Northern District of New York.

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| JAMES B. LYON *vs.* THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda. | In Equity. No. 6778. |

UNITED STATES OF AMERICA, *Northern District of New York, County of Erie, City of Buffalo,* } *ss.:*

John Cunneen, being duly sworn, deposes and says, that he is an attorney and counselor at law of the State of New York, and practicing his profession at Buffalo, N. Y.; that he has acted as attorney and counsel for the Town of Tonawanda for several years and has appeared for the said town at hearings before committees of the legislature of said State and before the governor of the said State concerning the proposed bills referred to in the bill of complaint herein, and has been the attorney and counsel of said town in all the suits and actions mentioned in the bill of complaint herein;

That he examined chapter 816 of the Laws of 1895, before the same was submitted to the legislature for enactment, and that he advised the town board, as its counsel, in the proceedings taken to make the assessment referred to in the bill of complaint herein, under the statute last mentioned;

That in the course of his duties aforesaid he has become familiar with all said transactions and personally knows that the matters of fact mentioned in the demurrer and pleas, verified by Honorable John K. Patton, supervisor of the town of Tonawanda, and presented and filed herewith, are true.

JOHN CUNNEEN.

Subscribed and sworn to before me, this 22d day of September, 1899.

[L. S.] WM. W. HAMMOND,
*Notary Public.*

56 *Affidavit of John K. Patton.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON
*vs.*
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda. } In Equity. No. 6778.

UNITED STATES OF AMERICA,
*Northern District of New York, County of Erie, City of Buffalo,* } *ss:*

John K. Patton, being duly sworn, does depose and — that he is one of the defendants in the above-entitled suit and is supervisor of the defendant The Town of Tonawanda, and has verified the demurrer and plea herewith filed; that the facts set forth in said demurrer and plea have come to the knowledge of deponent in the course of his duties as such supervisor and by the records of the town aforesaid which have been given in evidence and proven in his presence, and which he has personally examined; that the sale of the real estate of the complainant, described in the bill of complaint herein, has been adjourned for two weeks, to wit, until the 28th day of September, 1899, at ten o'clock in the forenoon; that if the complainant's lands are sold he will have one year within which he may redeem them from such sale.

JOHN K. PATTON.

Subscribed and sworn to before me, this 22d day of September, 1899.

[L. S.] WM. W. HAMMOND,
*Notary Public, Commissioner of Deeds in and for the City of Buffalo, N. Y.*

Indorsed: Affidavits. Filed September 23, 1899. W. S. Doolittle, clerk.

57 *Stipulation of Facts.*

United States Circuit Court for the Northern District of New York.

JAMES B. LYON, Complainant,
*vs.*
THE TOWN OF TONAWANDA and JOHN K. PATTON, Supervisor of the Town of Tonawanda, Defendants. } No. 6778.

It is hereby stipulated and conceded by all parties to the above-entitled action, as facts established by competent proof therein at the time of the trial and submission thereof in the above-named court, that on October 5, 1891, the legal title to the lands on Delaware street, described in the complaint, was conveyed by one Wyre and others to William F. Sheehan, in trust for himself and for the

plaintiff Lyon and one Defreest, and that on said day said Sheehan executed and delivered to his grantors to secure the payment of part of the purchase price of said lands three mortgages thereon, which were duly recorded on or about said day in the office of the county clerk of Erie county; that thereafter and on December 29, 1892, said Sheehan sold and conveyed said lands to one Hulbert, taking back from said Hulbert a mortgage for part of the purchase price, which was also duly recorded in said clerk's office at or about the time the same bore date, which said mortgage was held by said Sheehan until September 17, 1897; that on January 24, 1893, said Hulbert sold and conveyed said lands to the Columbia Land Company, which said company, while still the owner of said lands and on July 3, 1893, executed and
58 filed with the town board of the defendant The Town of Tonawanda the petition mentioned in defendants' plea in this action, and also on the 29th day of July, 1893, likewise so executed and filed with the said town board the consent set forth in said plea; that thereafter and on or about the 7th day of September, 1897, in an action in the supreme court, Erie county, in which the owners and holders of the three purchase-money mortgages executed and delivered by said Sheehan to his grantors on October 5, 1891, as first hereinabove mentioned, were plaintiffs, and said Sheehan and all other parties interested in said lands subsequent to said mortgages, including the said Columbia Land Company, were defendants, said three purchase-money mortgages were foreclosed and a judgment of foreclosure and sale entered, and on said day and by virtue of said judgment said lands were sold by referee duly appointed in said action of foreclosure and conveyed to said Sheehan, Defreest and Lyon, and thereafter and before the commencement of this action the interests of said Sheehan and Defreest therein were transferred to the plaintiff Lyon, who at the time of the commencement of this action was the owner and holder of the whole legal title thereto.

ROBERTS, BECKER, MESSER & GROAT,
*Solicitors for Complainant.*

JOHN CUNNEEN, *Solicitor for Defendants.*

Indorsed: Stipulation. Filed November 2, 1899. W. S. Doolittle, clerk.

59 *Decision.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON
*vs.*
THE TOWN OF TONAWANDA ET AL.

On motion for a preliminary injunction and on demurrer and plea to the bill.

The complainant is a citizen of the State of New York. The defendant The Town of Tonawanda is a municipal corporation of the

county of Erie and State of New York, and the defendant Patten is the supervisor of the said town. The parties are all residents of the northern district of New York, and the jurisdiction of this court is invoked solely upon the theory that a Federal question is involved.

The important allegations of the bill may be stated briefly as follows:

The complainant is the owner of two parcels of land, known as Nos. 59 and 62, situated in the town of Tonawanda and bounding on Delaware street, which is a public highway of said town connecting the village of Tonawanda and the city of Buffalo. In the year 1893 it was decided to pave said street with vitrified brick at an expense of $232,791, and in order to pay the said amount the complainant and other owners of land abutting on the said street
60 were assessed, pursuant to chapter 550 of the Laws of New York for 1893, according to the lineal feet fronting on said highway and without reference to the value of the land or the benefit conferred thereon. All the steps required to be taken under said law were taken except to advertise and sell the property, and thereafter nothing was done until the year 1895, when the legislature passed another act relating to the subject (chap. 816 of the Laws of 1895).

This act creates a town board and provides as follows:

"The said board is hereby authorized and empowered, and it shall be its duty to cause to be assessed the entire expense of the improvement aforesaid upon the several lots or parcels of land fronting or bounding upon that part of the highway so improved aforesaid, and in the manner provided by this statute for making local assessments for raising the expenses of grading and paving of streets; and pursuant to the rules of apportionment and division of the expense herein provided."

By section 30 of the act the expenses of local improvements for paving or macadamizing a highway are assessed "upon the lots fronting or bounding on both sides of that part of the highway in which the improvement shall be made. Frontage assessments shall be apportioned as follows: So much of the expense of the improvement shall be raised from each separate lot or parcel of land as shall be in the same proportion as the entire expense locally assessed as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made shall be to the aggregate of frontage or bounds to be subjected to the entire assessment."

Under this law the complainant's lands were again assessed for the paving of said Delaware street upon the basis of foot
61 frontage, as prescribed by both of said acts, namely, "On each of said lots and parcels of land in the same proportion to the entire expense locally assessed as the number of feet for which said lot or parcel of land bounded and fronted upon that part of the street in which the said improvement had been made was to the aggregate number of feet of frontage or bounds subjected to the entire assessment, which said assessment upon parcel No. 59, now owned by your orator, was $5,207.16 and on parcel No. 62 was $5,206.26."

These amounts, with interest added, are respectively $7,929.30 and $7,924.71, no part of the same having been paid. The defendant Patten, as supervisor, advertised the said lots for sale on the 14th of September, 1899, and will proceed to sell the same at auction unless restrained by injunction.

The lots assessed for the said pavement are of unequal value, size, and depth, are not benefited equally, and "under the terms and conditions and the rule and basis of levying said assessment it was impossible for the boards and officers making said assessments to levy and apportion said assessments in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street, or in any other way except in the arbitrary manner and method of assessing in such proportion to the entire expense assessed as the number of feet which any lot shall bound or front upon that part of the street in which the improvement shall have been made shall be to the aggregate number of feet of frontage or bounds to be subjected to the entire assessment, and that thereby and unless the sale thereof be enjoined and re-

62 strained by the decree of this court the lands and property of your orator hereinbefore mentioned will be taken for public use without just compensation and your orator will be deprived of his said lands and property without due process of law, contrary to the provisions of the Constitution of the United States."

The bill further alleges that the said lots will not sell for enough to pay the amounts assessed against them, and that the deficit will be levied in a general tax upon the lands of said town. The complainant owns land in said town other than the two parcels bounding on Delaware street, as aforesaid, which land will thus be subjected to unequal and unjust taxation, and in certain contingencies will be sold to discharge said tax, contrary to the provisions of the Constitution of the United States.

The bill states as a reason for not bringing this action sooner the pendency of various suits and proceedings in the State courts and in the legislature which proved abortive a short time prior to the filing of the bill. The complainant's lands were not advertised for sale and no active steps were taken to collect said assessment until on or about the 1st of August, 1899.

The bill prays for a decree declaring the State acts requiring the assessment for the said pavement to be made by the front-foot rule to be contrary to the provisions of the Constitution of the United States and enjoining the defendants from collecting the said assessment.

The defendants filed a demurrer, with which a plea is united. The grounds of the demurrer are as follows:

63 First. No cause of action in equity is stated in the bill.

Second. The complainant is guilty of laches in not appearing on the return day of the notice given, pursuant to the provisions of the two acts in question, and objecting to the said improvements upon the grounds now stated as invalidating the assessments.

Third. The complainant is guilty of laches in not having applied to the town board for relief and in not having taken proceedings

provided for by the laws of the State to review the assessments and test the constitutionality of the statutes in controversy.

Fourth. The complainant has an adequate remedy at law.

Fifth. There is a defect of parties for the reason that the other abutting land-owners, as well as the owners of the bonds issued for said improvements, should have been made complainants or defendants.

The plea alleges that in 1893 the Columbia Land Company, the then owner of the complainant's lots, petitioned the town board to make the improvements in question and did not object to the same at any stage of the proceedings, but, on the contrary, consented to the improvements and ratified and confirmed the action of the town board in making the same; that when the assessment was made under the statute of 1895 neither the complainant nor those in
privity with him appeared before the board, pursuant to
64 notice, and objected to the assessment-roll, and no action was
taken to review the same, as provided by the laws of New York, and no action was begun to have the same declared illegal until March of the present year; that this delay and inaction upon the part of the complainant and his predecessors amounts to laches which should bar a recovery.

The plea was subsequently modified or amended by a stipulation between counsel stating the facts regarding the complainant's title to the land in question. It thus appears that the Columbia Land Company, at the time the petition for the improvements to Delaware street and the consent to said improvements were filed by said company with the town board, was the owner of said land, subject to three purchase-money mortgages; that these mortgages were, in the autumn of 1897, foreclosed and the land purchased at the foreclosure sale by the complainant and two other parties, who subsequently conveyed their interest to the complainant, who is now the owner and holder of the legal title to said land.

The demurrer admits all of the allegations of the bill to which the demurrer applies, and as issue was not joined upon the plea, the same being set down for argument, the allegations of the plea must also be taken as admitted. The somewhat anomalous character of the defendants' pleading, combining as it does the characteristics of a demurrer, a plea, and an answer, presents the curious spectacle of the defendants admitting certain allegations of the bill to be true and the complainant admitting allegations of the plea to be true which are in irreconcilable conflict with the admitted statements of
the bill. However, this situation applies only to some of the
65 minor features of the controversy, the salient facts being admitted on both sides.

The cause was argued on September 23, 1899, at the Buffalo term, but for the convenience of counsel it was not finally submitted until November 14, 1899, many other causes having in the meantime obtained a preference.

Tracy C. Becker, for the complainant; John Cunneen, for the defendants.

COXE, *J.*:

This controversy is presented to the court upon what is practically an agreed state of facts. The fundamental question is whether or not an assessment, made pursuant to a State law, for grading and paving a highway, which apportions the entire cost of such improvement upon the abutting land according to the front-foot rule, without regard to the size and value of the parcels or the benefits derived from such improvements, is contrary to the fifth and fourteenth amendments to the Constitution of the United States.

If this question has been decided by the courts of the United States it is the duty of this court to follow these decisions, even though the courts of the State may have decided otherwise.

The leading authority is Norwood *v.* Baker, 172 U. S., 269. The facts, of course, differ somewhat from the facts in the case at bar, but that the broad principle there enunciated is applicable cannot be successfully controverted.

The opinion of the court contains an exhaustive review of
66 the judgments of State and national courts and the opinions of eminent text-writers on the subject, and reaches conclusions which may be summarized as follows:

First. Abutting owners may be subjected to special assessments to meet the expenses of opening and improving public highways upon the ground that special and peculiar benefits accrue therefrom, and the legislature has a wide discretion in defining the territory to be deemed specially benefited.

Second. The principle underlying special assessments of this character is that the property is peculiarly benefited and, therefore, the owners do not pay anything in excess of what they receive by reason of the improvement.

Legislative power is limited by this principle. The protection of private property would be seriously impaired were the rule established that the legislature may assess such property by the front foot with the entire cost of an improvement, whether the property is in fact benefited or not.

Third. "The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

Any substantial sum taken from the land-owner beyond the exceptional benefit received by him is extortion. Although the
67 legislature may prescribe the rule for the apportionment of benefits, this rule must be one under which it is legally possible that the burden may be distributed justly and equally. While abutting property may be assessed for improvements to a public street in front of it, such assessment must be measured by the special benefits accruing to such abutting property, namely, benefits not shared by the general public. The taxing of private property for profits and advantages which accrue exclusively to the public at large and which confer no benefits upon the property so taxed is taking private property for public use without compensation.

Fourth. Where an assessment is illegal because it rests upon a principle which excludes the consideration of benefits to the land assessed, it is unnecessary for the owner, as a condition of obtaining relief in equity, to pay or tender such a sum as he may concede due upon an assessment properly and legally made.

The case presents considerations of peculiar and extraordinary hardships, but there is nothing to indicate that the court intended to limit the broad principles enunciated to any particular state of facts. At least two of the circuit courts have since the decision applied its doctrine to facts closely approximating the case in hand.

In Fay *v.* Springfield, 94 Fed. Rep., 408, the cost of repaving a street in Springfield, Mo., was assessed, according to the front-foot rule, upon lots fronting on the street without regard to the question whether or not the various parcels of land were benefited to
68 the extent of the assessment. The learned district judge, after a careful review of the entire situation, reached the conclusion that the case before him was ruled by the judgment in Norwood and Baker. The opinion concludes as follows:

"Equality is equity: and the right of the owner of a lot to have this burden of special tax ratably distributed among the lots benefited does not depend alone upon the State constitution exacting equal taxation, but has 'its foundation in those elementary principles of equity and justice which lie at the root of the social compact' (*In re* Canal Street, 11 Wend., 154–156), and he can therefore invoke for his security and protection the Federal Constitution, which prohibits, not only the taking of private property for public use without just compensation, but the deprivation thereof without due process of law, and denies to the State the power to 'deny within its jurisdiction the equal protection of the laws.' Following what I conceive to be the ruling of the supreme court in the Village of Norwood case, *supra*, the temporary injunction asked for is granted."

To the same effect is Loeb *v.* Columbia Township, 91 Fed. Rep., 37.

It is argued that the Norwood case is inapplicable for the reason that the Ohio statute provided three alternative methods of assessment, namely: First, in proportion to the benefits; second, according to the value of the property; and, third, by the front-foot rule, while the statute under consideration here provides only for the assessment upon the lots fronting or bounding upon both sides of the highway. It is said that the village authorities, having adopted the front-foot rule under the Ohio statute, necessarily excluded the consideration of benefits received, while in the case at bar the statute permitted the board to consider the benefits to the land, and that they may have done so, and thereafter have fixed upon the front-foot rule as the most equitable method of apportioning these benefits.

It is thought that this construction is contrary to the plain
69 provisions of the law. Section 30 of the act of 1895 makes no reference whatever to any mode of taxation based upon the value of the property or which takes into consideration the benefits conferred. There is no affirmative authorization for proceeding

except by the front-foot rule. The section begins with the following provision:

"The expenses of local improvements shall be assessed as follows: For building or repairing sidewalks, by frontage assessment upon the lots in front of which the walk shall be constructed or repaired."

It is argued that because the word frontage is here used the elaborate provision for the apportionment of "frontage assessments" found at the end of the section applies only to sidewalks. Such a construction violates several well-known canons of statutory interpretation. It eviscerates the section, leaving it ambiguous, if not inoperative, as to the more important subjects treated by it. The section provides that the expenses for paving a highway shall be assessed upon the lots fronting or bounding thereon and then declares that frontage assessments shall be apportioned by the front-foot rule. An assessment upon lots fronting on a highway is "a frontage assessment" to the same extent as if the words quoted had been used; that the front-foot rule does not relate to sidewalks only is manifest from the language of the last clause of the section. The language requiring the assessments to be levied in proportion as the number of feet "bound or front" upon the street probably refers to the local improvements mentioned in all the preceding clauses; it certainly refers to "lots fronting or bounding" on the street, as described in the clause which immediately precedes it. If the legislature had substituted the words "assessments upon lots fronting on the
70 street" for "frontage assessments," so that the sentence in question would read, "Assessments upon lots fronting on the street shall be apportioned as follows," there could be no possible pretence for the contention of the defendants, and yet it is thought that this was unquestionably what the lawmakers meant. Any other construction leaves the section without any definite and certain provision regarding assessments for the most important improvements sanctioned by the law. An interpretation which renders an act meaningless or obscure should always be avoided. That the construction here approved was recognized by all as the proper one prior to the rise of this controversy is demonstrated by the fact that the board, acting upon the advice of counsel learned in the law and familiar with all the facts, assessed the complainant's lots according to the front-foot rule.

We have, then, the fact, alleged in the bill, admitted by the demurrer, conceded in the brief, that the complainant's land was assessed by the front-foot rule under a statute which certainly authorized, if it did not command, this mode of apportionment.

Why, then, does not the following language of Norwood and Baker apply?

"It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement without taking special benefits into account, and that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or

not to the extent of such cost. * * * Taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

71 The New York law, in failing to provide any method for ascertaining and apportioning benefits, resembles the Missouri statute, considered in the Fay case, *supra*, more closely than the Ohio statute. Of the Missouri law the court says:

"As persuasive proof that it was not in the mind or purpose of the framers of the Missouri statute that any such ascertainment should enter into the apportionment no method whatever is provided therefor, and the ordinance adopted by the city council clearly enough shows that the matter of relative betterments as a basis for the apportionment was not contemplated or provided for."

But it is argued that, though the rule adopted may lead to equitable results, there is nothing to show that this has been the case here. The frontage assessment may have been the most equitable and just that could have been adopted, and unless the complainant can show injury he cannot maintain his bill. It is contended that when the legislature adopts a method of apportionment, as in the statute at bar, it decides the proportion in which the land will be benefited.

Assuming that since the decisions of the United States courts these questions are open for discussion, and that the court may say that the arbitrary front-foot rule is a rule under which special benefits are not necessarily and uniformly excluded, it is thought that the arguments are not availing at the present time.

It should be remembered that this question is presented upon demurrer, all the allegations of fact in the bill being admitted.

It is true that these allegations are not as specific upon the question now under consideration as they might be, but the bill unquestionably avers that the abutting lots were not benefited

72 equally; that they were of unequal value, size, and depth, and that they were unjustly and unequally assessed. Under this allegation the complainant will be permitted to show the facts as they actually exist.

For instance, he might be able to prove that the Delaware Street pavement was an unquestioned benefit to the village of Tonawanda, the city of Buffalo, and to the terminal property, but a distinct disadvantage to the intervening land. It might be shown that the grade was so raised or lowered in front of the complainant's lots as to render them practically worthless for residential or business purposes. It might be shown that some of the property on the line is improved and of great value and other parcels are swamp land, not even available for farming; that some of the lots are five thousand feet deep and others five hundred feet deep; that some are worth five thousand dollars and others of equal frontage are worth but five hundred dollars.

Again, the complainant might prove that the grading and paving of the street so interfered with proper drainage that, whereas his land prior thereto had yielded him large profits, it is now under water and valueless.

These conditions are, of course, conjectural and are suggested to illustrate the impossibility of determining upon demurrer that benefits to the assessed property were considered under the rule of apportionment adopted by the board.

If the complainant should show that the building of the highway left his property twenty feet below the surface of the street, it
73 could hardly be contended that as to him the rule "was the most just and equitable that could be adopted."

On the other hand, should it appear that the front-foot rule properly and justly distributed the burden upon the property benefited, the doctrine of the authorities cited by defendants would be applicable.

Counsel for the defendants has shown great diligence in collecting the adjudged cases, and that many of them sustain the propositions for which he contends may well be conceded. No more careful and painstaking exposition of the law from his point of view could be presented. All of these authorities are, however, prior to the cases cited at the beginning of this decision and must yield to the paramount authority. Reluctant as this court is to interfere with proceedings instituted under State authority, there is no alternative when those proceedings are prohibited by a tribunal before whose judgments all must bow. After an earnest endeavor to give full weight to all that has been urged in favor of the defendants the court is unable to distinguish upon principle the case at bar from the Norwood case and the circuit court cases which have applied the doctrine there enunciated.

It is insisted by the defendants that the long delay in seeking redress amounts to inexcusable laches, which should prevent any relief from being granted. As the act under which the present assessment was levied was not passed until May, 1895, it is unnecessary in considering this question to discuss occurrences prior to that date. This proposition seems too plain for debate, and is, it would seem, conceded by the defendants.

74 As to the assessment in dispute, the act of 1895 superceded the act of 1893.

"It should be borne in mind," says the defendants' brief, "that the assessment made under the act of 1893 has been abandoned; that the assessment which defendants are enforcing is the one made under the act of 1895, * * * so that we are only concerned about the validity of the assessment made under the power last mentioned."

The complainant could not, therefore, have attacked the former assessment. The defendants made that course not only unnecessary, but impossible; they abandoned the assessment, leaving the complainant with no grievance and no cause of action. But four years are, then, to be accounted for. The bill alleges that the reason this action was not sooner commenced was:

First. The pendency in the State court of actions to set aside the assessment.

Second. Efforts at various times to procure the assistance of the legislature.

Third. An agreement between the land-owners and the town authorities to suspend affirmative action on both sides until the decision of the court was announced or until the legislature had passed an act providing for a fair and just apportionment.

The case of Jones *vs.* these defendants, 158 New York, 438, was not decided by the court of appeals until March 21, 1899. No active steps were ever taken to collect the assessment until about the 1st of August, 1899, and within six weeks thereafter this action was
75 commenced. No laches can be predicated of these admitted facts. The complainant had a right to rely upon the pendency of other proceedings and the understanding on all hands to await their determination. Indeed it may well be doubted whether, in any event, he was called upon to act until his property was actually threatened. Had he not a right to assume that the defendants would not attempt to collect an illegal tax and rest upon this assumption until some overt act was committed?

If the complainant had begun this suit while all parties were endeavoring to reach a just apportionment he would probably have been denounced as an impertinent and perniciously active interloper, who had failed to keep faith with the defendants and who had complicated the situation by an unnecessary and vexatious litigation. One who fires on his adversary during the existence of an armistice should not be encouraged, but denounced as an outlaw.

The most cogent argument advanced by the defendants in the judgment of the court, is based upon the alleged estoppel growing out of the acts of commission and omission of the former owner of the complainant's land. There can be no doubt that the Columbia Land Company petitioned for, consented to, and acquiesced in the improvement as originally projected. It is contended that the complainant is bound by these acts, and is therefore remediless.

The answers are:

First. Even though the complainant was in privity with the Columbia Company, an assent to be assessed under the law
76 of 1893 was not an assent under the law of 1895, with all its changed conditions and additional burdens.

Second. A petition for an improvement is not a petition for an illegal assessment.

In all the company's acts there is nothing inconsistent with the theory that it supposed the expense of the improvement would be lawfully and justly apportioned. It did not assent to extortion or to confiscation or to the taking of its property for public use without compensation.

Third. As the law under which the proceedings were instituted was unconstitutional and void, the consents given thereunder were inoperative and bound no one.

That in the circumstances here, where neither the Columbia Company nor the complainant has received any advantage or retained any benefit under the law, the right to assert its unconstitutionality was not and could not be waived.

Fourth. The essential elements of an estoppel are lacking, there being nothing to show that the defendant- relied upon the company's

acts or were misled thereby. There is nothing to show that the petition and consent induced the improvement. For aught that appears to the contrary, the pavement would have been laid precisely as it was laid if the Columbia Company had never existed. No injury to the defendants or benefit to the complainant followed from these acts.

Fifth. The complainant is not in privity with the Columbia Company. His title is derived from prior purchase-money mort-
77 gages, and since he obtained title he has maintained a position of open and avowed hostility to what he insists is an illegal tax.

Equity recognizes and tolerates estoppels, but does not encourage them: she admits them into her domains, but they are usually regarded as undesirable aliens, having little in common with the other members of her family.

Before saying to a suitor that his rights have been destroyed by his own act a court of equity should be certain of the rectitude of its position.

The general nature of an estoppel is well stated as follows:

"An estoppel may be defined in a general sense to be a preclusion of a person to assert a fact which has been admitted or determined under circumstances of solemnity, such as by matter of record or by deed, or which has, by an act *in pais*, induced another to believe and act upon to his prejudice. * * * Estoppels must be certain to every intent and are not to be taken by argument or reference."

(Am. & E. Enc. of Law, 2d ed., vol. 11, 387.)

It may well be doubted whether the complainant was in privity with the Columbia Land Company. His title was derived from a conveyance prior to the deed to the company. The company held only the equity of redemption and could do nothing to impair the value of a prior mortgage. The complainant's title did not come from or through the company: it came from a source which was paramount, prior, and in a sense hostile to the company's title.

Mr. Justice Story clearly states the general rule of privity in Carver *v.* Jackson, 4 Peters, 1, as follows:

"The recital of one deed of title in another binds the parties
78 and those who claim under them. Technically speaking, it operates as an estoppel and binds parties and privies, privies in blood, privies in estate, and privies in law, but it does not bind mere strangers or those who claim by title paramount to the deed. It does not bind persons claiming by an adverse title or persons claiming from the parties by title anterior to the date of the reciting deed."

See also Oliver *v.* Piatt, 3 How., 333, 412, and Corning *v.* Troy Nail Factory, 40 N. Y., 191, 203.

Assuming, however, that the Columbia Company was in privity with the complainant, it is thought that the latter is not estopped from maintaining this suit.

A similar claim of estoppel was advanced in Sharp's case, 56 N. Y., 257. In overruling the claim Judge Grover made use of lan-

guage which, in principle, is directly applicable to the case in hand. He says:

"It is insisted by the counsel for the appellant that the petitioner is estopped from denying the power of the board to do the work by having signed the petition asking to have it done. Upon principle there is no basis for such an estoppel. All that the petitioner did was as a property-owner to petition the board to proceed and repave the street in the mode desired by him, as he lawfully might. He made no representation to the board that the signers constituted a majority of the owners of property fronting on the street or anything to that effect. He had a right to rely upon the performance of its duty by the board, which was upon the presentation of the petition and before basing any action thereon to ascertain whether the numbers who had signed were sufficient to confer jurisdiction to act. Signing or presenting it was no assertion of its sufficiency in this respect. It contained a representation that the petitioner owned property fronting upon the street, and that he desired, in case a sufficient number of like owners united therein to constitute a majority, that the street should be paved with Nicholson pavement. A party is estopped only when by his declarations or conduct he has induced another to act upon the supposed existence of a fact and would be in consequence injured by showing its non-existence. There is no such element in this case. The consequence of the doctrine contended for would be to make the assessment valid upon such owners as had signed the petition, while invalid as to all others, leaving the former not only to pay their just portion of the expense, but to contribute as tax-payers to the payment of the portions which should have been imposed upon those who had not signed. The principle contended for, if generally applied, would involve most mischievous consequences. One signing a petition to the commissioners
79 of highways to lay out a road would be estopped from showing that the proceedings based thereon were not legal, and hence the road might be adjudged a legal highway as to him, while it was not as to the public generally. The cases calling for its application, it is readily seen, would be quite numerous, and the consequences would create much confusion and hardship."

Upon this branch of the controversy the proposition may be broadly stated as follows:

The property of A, who obtains title through the foreclosure of a purchase-money mortgage, is unlawfully assessed for a local improvement in the sum of $16,000 under an unconstitutional law. When the improvement was first proposed B held title to the property, acquired subsequently to the date of the mortgage and subject to it. B petitioned for and assented to the improvement under a prior statute, which two years after its passage was superceded, the assessment thereunder being abandoned. By the foreclosure of the mortgage B's title was extinguished, A taking no title from B. In these circumstances is A estopped from contesting the validity of an assessment made under a subsequent statute? The court is of the opinion that this question must be answered in the negative.

This is one of that class of cases where the granting of preliminary

relief is inseparably linked with the final decree. The latter depends upon the former for its efficacy. Without an injunction a judgment in favor of the complainant would be a mere *brutum fulmen*. His property once sold, he has no adequate remedy in law or equity, and even should he finally succeed, it will require years of litigation before his rights are finally restored. He pre-
80 sents a cause of action which, even from the defendants' point of view, is founded upon propositions which are entitled to the most grave and serious consideration.

Manifestly it is the duty of the court not to permit the defendants at the outset to accomplish the injury which it is the object of the suit to prevent. The inconvenience to the defendants by the delay is not to be compared to the irreparable injury to the complainant if his property is taken without due process of law. If the defendants finally succeed, the sale will be made with the full assurance that the purchaser will receive a valid title. Even if the court entertained a doubt upon the main propositions involved it would still be its duty to maintain the present status until these important questions are finally answered after a trial upon the facts.

Whether the difficulty can be cured by remedial legislation it is not for this court to determine. Both counsel seem to agree that it can be and it is clear that an act providing for a just and equitable reassessment based upon benefits received could not be attacked upon the present lines.

The right of the legislature to intervene seems to be recognized by the court of appeals in the Jones case, and in the Norwood case Mr. Justice Harlan says, at page 293:

"It should be observed that the decree (of the circuit court) did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it to make a new assessment upon the plaintiff's abut-
81 ting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accrusing to the property. * * * The decree does not prevent the village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion."

(See also Spencer *v.* Merchant, 100 N. Y., 585.)

It follows that the demurrer and plea must be overruled, the defendant to answer within twenty days.

The motion for a preliminary injunction is granted, the complainant to give a bond in the usual form for an amount that will be fixed upon the settlement of the order.

Indorsed: Decision, Coxe, J. Filed December 18, 1899. W. S. Doolittle.

82 *Bond.*

Know all men by these presents that we, The Town of Tonawanda, in Erie county, and John K. Patton, supervisor of the town of Tonawanda, as principals, and the United States Fidelity & Guaranty Company, a surety corporation, having an office and usual place of business at No. 140 Broadway, in the city of New York, as surety, are held and firmly bound unto James B. Lyon in the full and just sum of two hundred and fifty dollars ($250.00), to be paid to the said Lyon, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventeenth day of January, in the year of our Lord one thousand nine hundred.

Whereas lately, at a session of the United States circuit court for the northern district of New York, in a suit pending in said court between James B. Lyon, complainant, and The Town of Tonawanda, in Erie county, and John K. Patton, supervisor of the town of Tonawanda, defendants, a final decree was rendered against the said defendants, and the said defendants having obtained the allowance of an appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to the said Lyon, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof:

Now, the condition of the above obligation is such that if the said defendants shall prosecute said appeal to effect and answer all
83 costs and if they make good their plea, then the above obligation to be void; else to remain in full force and virtue.

TOWN OF TONAWANDA, N. Y.,
By JAMES B. HUFF, *Supervisor.* [L. S.]
JOHN K. PATTON.
[L. S.] THE UNITED STATES FIDELITY & GUARANTY COMPANY.
VINCENT D. RYAN, *Attorney-in-fact.*

Approved January 17th, 1900.

——— ———.

[2½ cents of revenue stamps, cancelled.]

[Endorsed:] Copies of bond.

84 STATE OF NEW YORK, )
*County of Erie, City of Buffalo,* ) *ss.:*

On this fifteenth day of January, 1900, before me personally came Vincent D. Ryan, attorney-in-fact of the United States Fidelity and Guaranty Company, a corporation created and existing under and by virtue of the laws of the State of Maryland, and duly authorized to transact business in the State of New York, to me known, who,

being by me duly sworn, did depose and say that he resided in the city of Buffalo; that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed *in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed* to the said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto as attorney-in-fact of said company by like order; that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the year 1893 and the acts amendatory thereof and supplementary thereto.

AUSTIN F. RYAN,
*Notary Public, Erie Co.*

[L. S.]

85 At a special meeting of the board of directors of the United States Fidelity and Guaranty Company, held at the office of the company, in the city of Baltimore, State of Maryland, on the 19th day of January, 1899, at which was present a quorum of said directors duly authorized to act in the premises, on motion, it was unanimously

Resolved, That in pursuance of section 811 of the Code of Civil Procedure of the State of New York, James Ryan, Vincent D. Ryan, and Austin F. Ryan, the attorneys-in-fact of the United States Fidelity and Guaranty Company, for the county of Erie, in the State of New York, be, and each of them is hereby, authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for and in behalf of this company, and to attach thereto the seal of the company, the same to be attested by either one of said attorneys-in-fact named as occasion may require.

CITY OF BUFFALO, } ss.:
*County of Erie, State of New York,* }

I, Vincent D. Ryan, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is true and correct transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at Buffalo, N. Y., this 15th day of January, 1900.

[L. S.]

VINCENT D. RYAN,
*Attorney-in-fact.*

86 UNITED STATES OF AMERICA, } ss.:
*Northern District of New York, County of Erie, City of Buffalo,* }

On this 16th day of January, 1900, before me, the subscriber, personally appeared James B. Huff, to me known and known to me

to be the same person described in and who executed the foregoing bond, and he duly acknowledged to me that he executed the same.

WM. W. HAMMOND,
*Notary Public.* [L. S.]

UNITED STATES OF AMERICA,
*Northern District of New York, County of Albany, City of Albany,* } *ss:*

On this 17th day of January, 1900, before me, the subscriber, personally appeared John K. Patton, to me known and known to me to be the same person described in and who executed the foregoing bond, and he duly acknowledged to me that he executed the same.

JAS. W. BENTLEY,
[L. S.] *Notary Public, Albany Co., N. Y.*

Indorsed: Bond. Approved. A. C. Coxe, U. S. J. Filed Jan. 17, 1900. W. S. Doolittle, clerk.

87 *Assignment of Errors.*

United States Circuit Court, Northern District of New York.

JAMES B. LYON, Complainant,
*vs.*
THE TOWN OF TONAWANDA and JOHN K. Patton, Supervisor of the Town of Tonawanda, Erie County, Defendants. } In Equity. No. 6778.

Now come the defendants and file the following assignment of errors, upon which they and each of them will rely upon their and each of their appeal from the final decree made by this honorable court in the above-entitled cause:

1st. The court erred in holding and deciding that the complainant is not estopped from maintaining this suit by the affirmative acts of his predecessor in title in petitioning for and consenting to the making of the improvement, and by his own acquiescence and the acquiescence of the owner of the mortgage, on the foreclosure of which he derived title, in the making of said improvement, whereas the court should have held that the complainant was and is estopped from maintaining this suit by reason of the said affirmative acts and acquiescence aforementioned.

2nd. The court erred in holding and deciding that the complainant by his bill makes a case which entitles him in a court of equity to relief against the defendants or either of them touching the matters contained in the said bill, whereas the court should have held and decided the contrary thereof.

3rd. The court erred in holding and deciding that the bill contained matter of equity whereon to sustain the writ of injunc-
88 tion sought, prayed for, and awarded, whereas the court should have held and decided that the bill contained not any

matter of equity whereon to sustain such writ of injunction as is sought, prayed for, and is granted by the decree herein.

4th. The court erred in holding and deciding that the complainant was not guilty of laches which should bar and preclude his right to the relief prayed for or to the injunction granted herein, whereas for the reasons specified and enumerated in the demurrer and plea filed herein and to which, for the purpose of avoiding expense and prolixity, the defendants crave leave that at all times reference be had for greater certainty as to their contents, the court should have held that the complainant was barred by laches and acquiescence from having or maintaining the relief prayed for and granted by the decree herein.

5th. The court erred in holding and deciding that the complainant was entitled to the relief prayed for because of the invalidity of the statute under which the assessment was levied, whereas the court should have held and decided that the invalidity of said statute was and is a matter of record appearing upon the face thereof, and that therefore a court of equity would not interpose to restrain or enjoin proceedings taken under claim of authority of such invalid statute.

6th. The court erred in holding and deciding that the complainant was entitled to relief in equity, whereas the court should have held and decided that the complainant has a full, adequate, and complete remedy at law.

7th. The court erred in holding that the statute under which the assessment was levied required that the assessment should be made arbitrarily and without reference to the benefits which the assessment conferred upon the complainant's lands, whereas the
89 court should have held and decided that the statute authorized and empowered the town board of the town of Tonawanda to levy and make said assessment upon the property described in the bill of complaint in proportion to and upon the basis of the amount of benefit which the making of the improvement conferred upon the said lands and premises.

8th. The court erred in holding and deciding that the mere apportionment of the assessment in proportion to the relative frontage of the several parcels of land upon the improvement established that it was made arbitrarily and without reference to benefits conferred upon the land by the improvement, whereas the court should have held and decided, in the absence of evidence to the contrary, that the town board adopted this rule of apportionment as a result of a prior determination that each parcel of land was benefited by the improvement in proportion to its relative frontage or bounds upon that part of the street improved.

9th. The court further erred, after having erroneously construed the statute as prescribing that so much of the assessment should be apportioned to and assessed upon each parcel of land fronting or bounding on the improvement as should be in the same proportion to the entire expense as its frontage upon the improvement was to the entire frontage, in holding and deciding that by reason thereof the statute was void, whereas the court should have held that the

legislature of the State of New York under the constitution of that State had power and capacity to ascertain, adopt, and prescribe such method of apportionment as in its judgment would best result in apportioning to and assessing upon each lot or parcel of land that part of the expense which was justly its share because of the benefit which the improvement conferred upon it; that it must be presumed, in the absence of evidence to the contrary, that this rule was prescribed after proper deliberations and a * * * prior determina-
90 tion that it would best result in apportioning the expense of the improvement in proportion to the benefits which the improvement conferred.

10th. The court erred in holding and deciding that the proper parties were before the court in this suit, whereas the court should have held and decided that all persons within the jurisdiction of the court whose property is included in said assessment-roll should be parties to this suit, and that the owners of the bonds which had been issued and sold under the statutes referred to should be made parties to this suit, as the rights and interests of said other owners of real estate and bondholders are necessarily affected by the decree in this suit and are united in interest with the complainant in the subject-matter thereof.

11th. The court erred in holding and deciding that the Columbia Land Company, the complainant's predecessor in title, by signing the petition for and consenting to the said improvement and assessment did not waive its right to aver or claim that said statutes or either of them were unconstitutional or void, and that the complainant was not also estopped, whereas the court should have held and decided that the Columbia Land Company by petitioning for and consenting to the action by the town board under said statutes waived their right to insist or aver that the statutes, or either of them, were unconstitutional, and should have held that the complainant, being a successor in title, is also barred and precluded for the reason aforesaid.

12th. The court erred in holding and deciding that the complainant was not estopped from questioning the validity of the
91 statutes aforesaid or of either of them, whereas the court should have held and decided that the holder of the mortgage upon the lands described in the complaint and upon the foreclosure of which the complainant took title was estopped and precluded by the action of the owner of the equity of redemption in petitioning for and consenting to the improvement and by his own negligence and laches in acquiescing in the making of the improvement and in not taking any of the proceedings at law which the laws of the State of New York afforded to correct the proceedings or prevent the making of the improvement, the incurring of the expense, or the issuing of the bonds, and that the complainant, as a successor in title to the owner of the equity of redemption and the owner of the mortgage, is also estopped and precluded by said affirmative action in petitioning for and consenting to and in the acquiescence in the proceedings and improvement, as aforesaid.

Wherefore the said The Town of Tonawanda and John K. Patton,

supervisor of the town of Tonawanda, jointly and severally, pray that the final decree of the circuit court of the United States for the northern district of New York aforesaid be reversed, and that the said court be directed to grant and enter a decree dismissing the bill of complaint in this suit upon the merits and awarding to these defendants their costs and disbursements in that behalf most wrongfully sustained.

JOHN CUNNEEN,
*Solicitor for the Appellants and Defendants,*
85 *West Eagle Street, Buffalo, N. Y.*

Indorsed: Assignment of errors. Filed January 17, 1900. W. S. Doolittle, clerk.

92 *Petition for Appeal.*

United States Circuit Court, Northern District of New York.

THE TOWN OF TONAWANDA, IN ERIE County, and John K. Patton, Supervisor of the Town of Tonawanda, Plaintiffs, Appellants,
*vs.*
JAMES B. LYON, Defendant, Respondent. } In Equity. No. 6778.

The above-named Town of Tonawanda and John K. Patton, supervisor, conceiving themselves aggrieved by the decree rendered on the 17th day of January, 1900, in the above-entitled suit, do, jointly and severally, hereby appeal from said decree to the Supreme Court of the United States, and they and each of them pray that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated January 17th, 1900.

JOHN CUNNEEN,
*Solicitor for Plaintiffs, Appellants,*
85 *West Eagle Street, Buffalo, N. Y.*

And now, to wit, on January 17th, 1900, it is ordered that the appeal be allowed as prayed for.

ALFRED C. COXE, *U. S. J.*

93 UNITED STATES OF AMERICA, *Northern District of New York,* } *ss:*

To James B. Lyon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal allowed and taken in a certain suit in the United States circuit court for said district, wherein The Town of Tonawanda, New York, and John K. Patton, supervisor of said town, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the decree rendered against

the said plaintiffs in error, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of Albany, in said northern district, on the 17 day of January, one thousand nine hundred.

ALFRED C. COXE.

I hereby admit due personal service of the foregoing citation. January 17, 1900.

ROBERTS, BECKER, MESSER & GROAT,
*Solicitors for James B. Lyon, Defendant in Error.*

94 [Endorsed:] 6778. U. S. circuit court, northern district of New York. The Town of Tonawanda, in Erie County, and one, plaintiffs, appellants, *vs.* James B. Lyon, defendant, respondent. Original. Petition for appeal, allowance, citation, and admission of service. John Cunneen, solicitor for plaintiffs, appellants; office and P. O. address, 85 West Eagle street, Buffalo, N. Y. In equity. No. 6778. U. S. circuit court, N. D. of N. Y. Filed Jan. 17, 1900. W. S. Doolittle, clerk. D. C.

95 UNITED STATES OF AMERICA, }
*Northern District of New York,* } *ss:*

I, William S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 94, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of James B. Lyon *vs.* The Town of Tonawanda and John K. Patton, supervisor of the town of Tonawanda, Erie county, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the northern district of New York, in the second circuit, this ninth day of February, in the year of our Lord one thousand nine hundred, and of the Independence of the said United States the one hundred and twenty-fourth.

[Seal of the U. S. Circuit Court, Northern District, N. Y.]

W. S. DOOLITTLE, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 2, 9, 1900. W. S. D.]

Endorsed on cover: File No. 17,657. N. New York C. C. U. S. Term No., 214. The Town of Tonawanda, New York, and John K. Patton, supervisor of said town, appellants, *vs.* James B. Lyon. Filed February 27, 1900.

FILED
FEB 25 1901
JAMES H. McKENNEY,
Clerk.

No. 214.

Br. of Cunneen for Appts.

Filed Feb. 25, 1901

JOHN CUNNEEN,
COUNSEL,
BUFFALO, N. Y.

# APPELLANTS' BRIEF.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1900.

No. 214

---

THE TOWN OF TONAWANDA AND ANOTHER, *Appellants*,

vs.

JAMES B. LYON.

---

JOHN CUNNEEN,
COUNSEL,
BUFFALO, N. Y.

# APPELLANT'S BRIEF.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1900.

**No. 214**

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THE TOWN OF TONAWANDA AND ANOTHER, *Appellants*,

*vs.*

JAMES B. LYON.

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Appeal from the Circuit Court of the United States for the Northern District of New York.

*Statement.*

This suit was brought to have a local assessment made by the Town Board of the Town of Tonawanda, Erie County, State of New York, adjudged void, and for a perpetual injunction against the enforcement of the same. The relief is claimed upon the allegations of the bill that the amount assessed is the expense of improving a highway in said town connecting the City of Buffalo and the Village of Tonawanda, and expenses incident thereto. (*Fols.* 5-6 of Record). That the plaintiff is the owner of two parcels of land fronting on said highway so improved and included in said assessment. (*Fol.* 4).

That said improvement was made under a statute passed by the Legislature of the State of New York in 1893, and distinguished by Chapter 550 of the laws of that year, which statute authorized the Town Board to borrow the moneys necessary, to issue bonds of the Town for the same with interest, and to assess the amount necessary to pay said bonds and interest upon the lands fronting or bounding upon that part of the highway improved; that an assessment roll of said expense was made pursuant to this statute. (*Fols.* 5-6). That said Legislature enacted another statute in 1895, which is distinguished by Chapter 816 of the Laws of that year, and which authorized and empowered the Town Board to again assess said expense and to make a new assessment roll it is alleged "in the manner provided "by said statute for making local assessments for raising the ex-"penses of grading and paving of streets, and pursuant to the "rules of apportionment and division of the expense therein pro-"vided." (*Fol.* 9). And that as it is alleged "said Act also pro-"vided and enacted that the expense of local improvements for "paving or macadamizing any highway should be assessed upon "the lands fronting or bounding on both sides of the part of the "highway upon which the improvement was made, and that so "much of the expenses of the improvement should be raised from "each separate lot or parcel of land as shall be in the same pro-"portion to the entire expense locally assessed as the number of "feet for which the lot shall bound or front upon that part of the "street in which the improvement shall have been made shall be "to the aggregate number of feet of frontage or bounds to be sub-"jected to the entire assessment." (*Fols.* 9 and 10).

That as it is alleged the Town Board after the Act of 1895 was passed "by virtue of the provisions of said Act, adopted "and filed an assessment roll" * * * "to raise the "amount of such assessment for said improvement, and that "in and by said assessment, so much of the entire expense of the "improvement of grading and paving said Delaware street and

"highway, including interest on moneys borrowed by the issue "and sale of said bonds hereinbefore described, and the expense "pertaining to the making of said improvement, or the money "borrowed for that purpose, by said Town, which remained un- "paid, was assessed on each of said lots and parcels of land in the "same proportion to the entire expense locally assessed as the "number of feet for which said lot or parcel of land bounded and "fronted upon that part of the street in which the said improve- "ment had been made, was to the aggregate number of feet of "frontage or bounds subjected to the entire assessment, which "said assessment upon Parcel No. 59, now owned by your "orator, was $5,207.16, and on Parcel No. 62, was "$5,206.26."

It is further alleged "that all the lands assessed for said im- "provement of grading and paving said Delaware Street, such "highway, hereinbefore set forth, were not and are not benefitted "equally by the making of said improvement of grading and "paving said street; that many of said lots and parcels are un- "equal in size and depth and of unequal value." (*Fol.* 13).

It is also shown by the bill that under the statutes referred to the amount of the assessment is a lien upon the plaintiff's property, that no payments have been made on the assessments, and that the complainant apprehends that the defendants are about to proceed to sell his lands in satisfaction of the assessment liens.

*There is no allegation in the bill that any injustice or wrong to the complainant has resulted from the methods of apportionment adopted, or that the complainant is compelled to pay more of the expense of the improvement than is equal to the value of the benefits conferred upon his land by the improvement.* It cannot be claimed that such is inferable from that the lots "are not benefitted equally by the making of said improvement" and of unequal size, depth and value, because the ~~value~~ and size affected the value and the amount apportioned depended on the size. Besides a claim for relief should not be made upon inferances. It should be sustained by verified facts. The claim for relief rests solely and exclusively upon the claim that an erroneous or unlawful method of apportionment, was used by the Town Board. There are allegations, conclusions of law, that if the Court will not grant the relief desired, "the lands and property of your "orator hereinbefore mentioned, will be taken for public use with- "out just compensation, and your orator will be deprived of his "said lands and property without due process of law, contrary "to the provisions of the Constitution of the United States."

But the only facts alleged from which it is attempted to draw these conclusions, are those to which the attention of the Court has hereinbefore been invited.

The defendants filed a demurrer and plea to this bill. (*See fols.* 27-40 of Record). The demurrer and plea were over-ruled, and thereupon the defendants answered. They admitted that

the improvement had been made; that the indebtedness had been incurred; that the bonds had issued; that over $200,000 of the indebtedness remained unpaid; that a large part thereof had become due, and that the Supervisor of the Town was taking proceedings for the sale of the plaintiff's lands; they admitted that the assessment and re-assessment had been made; they admitted that each of the assessments had been made by apportioning to each parcel of land so much of the amount assessed as bore the same relation to the entire amount that the frontage of the parcel upon the street bore to the entire frontage upon that part of the street improved.

But they denied "that said method was an arbitrary manner "or method of assessing the same, because in following said "method, as aforesaid, they obeyed the mandate of said statute, "and on that behalf they allege and aver upon their information "and belief that that rule of apportionment was adopted and au- "thorized by the Legislature of the State of New York with refer- "ence to, after inquiry into, and upon consideration and deter- "mination of the benefits which the improvement authorized and "made conferred upon the said lands, which inquiry, considera- "tion, and determination appears by the statutes aforesaid and "by each of them, and that the Legislature of the State of New "York, under the Constitution of that State, has frequently in- "terpreted by its highest courts, had and now has the power and "capacity to prescribe such rule for apportioning expense of local "improvement as will in its judgment best result in apportioning "to each parcel of land assessed that part of the expense which "shall be in proportion to the benefit conferred by the improve- "ment."

They denied "that under the terms and conditions and the "rule and basis of levying said assessment it was impossible for "the boards and officers making said assessments to levy and ap- "portion said assessments in proportion to the benefits received "by each parcel of land assessed to pay for said improvement of "grading and paving said street, and beg leave to submit the "said statute and every part thereof to this Honorable Court "upon the hearing of this case, that proper construction thereof "may be given by the Court."

They "further allege and aver that said determination made "by the Legislature and evidenced by the said statutes and by "each of them bars and precludes the complainant from asserting "or claiming that said assessment is not made upon the com- "plainant's lands in proportion to the benefits which they derived "by the making of said improvement; and they crave leave to "submit the said statutes and each and every part of them to "this Honorable Court, that the same may be properly construed "in that regard." (*Fol.* 47).

The defendants then reiterated the first, second and third paragraphs of their pleas adopting and making them a part of their answer, which paragraphs are as follows, to-wit:

First:—They deny that it was impossible for the Boards and Officers making said assessment to levy and apportion said assessment in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street, and allege that the provisions of the statute aforesaid in that regard only required that the said Boards and Officers should assess the expense of said improvement upon the lots fronting or bounding on both sides of that part of the highway on which the improvement was made, and that the said Boards and Officers were free to and that it was their duty under the provisions of said statute to assess said expense upon said several lots or parcels of land in proportion to the benefit which each of them derived by the making of said improvement.

Second:—And further plead that after the enactment of chapter 550 of the Laws of the State of New York of 1893 in the bill referred to, and on or about the 3d day of July, 1893, the Columbia Land Company, a corporation organized under and pursuant to the Laws of the State of New York, was the owner in fee of the lands and premises described in the bill of complaint and now belonging to the complainant, whose title is derived as follows, viz:

On October 5, 1891, the legal title to the lands on Delaware street described in the complaint was conveyed by one Wire and others to William F. Sheehan in trust for himself and for the plaintiff Lyon and one Defreest, and on said day said Sheehan executed and delivered to his grantors to secure the payment of part of the purchase price of said lands three mortgages thereon, which were duly recorded on or about said day in the office of the County Clerk of Erie County, N. Y.; that thereafter and on December 29, 1892, said Sheehan sold and conveyed said lands to one Hulbert, taking back from said Hulbert a mortgage for part of the purchase price, which was also duly recorded in said clerk's office at or about the time the same bore date, which said mortgage was held by said Sheehan until September 17, 1897; that on January 24, 1893, said Hulbert sold and conveyed said lands to the Columbia Land Company; that thereafter and on or about the 7th day of September, 1897, in an action in the Supreme Court, Erie County, in which the owners and holders of the three purchase-money mortgages executed and delivered by said Sheehan to his grantors on October 5, 1891, as first hereinafter mentioned, were plaintiffs and said Sheehan and all other parties interested in said lands subsequent to said mortgages, including the said Columbia Land Company, were defendants, said three purchase-money mortgages were foreclosed and a judgment of foreclosure and sale entered, and on same day and by virtue of said judgment said lands were sold by referee duly appointed in

said action of foreclosure and conveyed to said Sheehan, Defreest, and Lyon, and thereafter and before the commencement of this action the interests of said Sheehan and Defreest therein were transferred to the plaintiff Lyon, who at the time of the commencement of this action was the owner and holder of the whole legal title thereto.

That on the said 3d day of July, 1893, the said Columbia Land Company, then being the owner of said lands, as aforesaid, subject to said mortgages, filed with the Town board of the town of Tonawanda a written petition, signed by the said coporation and other owners of property fronting and bounding on that part of the Delaware street or road improved, as mentioned in the bill of complaint, wherein the said signers petitioned the said Board to order said part of said road or street to be paved forty feet in width "persuant to the provisions of Chapter 550 of the Laws of 1893, authorizing the paving of streets in the Town of Tonawanda."

That thereupon, and on said 3d day of July, 1893, the Town Board of the Town of Tonawanda, initiated the proceedings mentioned in said petition, in the form specified in said statute.

That by Section 1 of Chapter 550 of the Laws of New York of 1893, the Town Board of the Town of Tonawanda were required to give notice and a hearing to all persons interested in said improvement before determining to make the same. Reference is hereby made to said Statute for greater certainty as to its form and requirements. That the said Board upon filing said petition and adopting a resolution proposing to make said improvement did give said notice, and designated therein a time and place within said town when the Board would meet to hear all persons interested in said improvement who should appear pursuant to said notice or otherwise to make such objections as they might have to such improvement, and that the Board aforesaid met at the time and place mentioned in said notice but that neither the complainant nor any person with whom he is in privity of estate, appeared before the said Board at the time and place aforesaid or made any of the objections to the said improvement or to the said statute or to its validity which are mentioned in the bill in this suit, or any of said objections whatsoever, and that thereupon the Town Board determined to make said improvement.

That Section 4 of the Statute last mentioned provided that said determination to make said improvement should have "no force or effect until the consent in writing shall be obtained of the owners of at least one-half of the actual feet frontage of land on each side of any highway ordered as aforesaid to be improved, excepting therefrom the space occupied by highways crossing the same."

And that afterwards, and on or about the 19th day of July, 1893, the said Columbia Land Company then being the owner in fee of the lands and premises now owned by the complainant in

this action as alleged in the said bill, the said lands being then subject to said mortgagees, as aforesaid, there was filed with the Town Board of the Town of Tonawanda another writing, wherein it was recited that the Town Board had "in pursuance of Chapter 550 of the Laws of 1893 duly ascertained and determined the expense" of the improvement and "having duly met and heard all objections offered by any party interested in said improvement, and said Board having thereupon and on the 25th day of July, 1893; duly ordered and determined" to make said improvement, further continued as follows:

"Now, therefore, in pursuance of Section 4 of said Chapter 550 of the Laws of 1893, we, the undersigned, being the owners of more than one-half of the actual feet frontage on each side of said highway to be improved as aforesaid (excepting therefrom the space occupied by highways crossing the same), do hereby consent to said improvement as ordered, hereby ratifying and confirming the action of said Town Board in the regard mentioned."

Which last mentioned written instrument so filed as aforesaid with the Town Board was signed by the said corporation Columbia Land Company by its proper officers, and by numerous other persons and corporations owning lands fronting and bounding on that part of the street or highway aforesaid improved as aforesaid. And that thereupon, and on the 29th day of July, 1893, upon receiving and filing the written consent of property owners last mentioned, the Town Board of the Town of Tonawanda determined that the consent in writing of the owners of at least one-half of the actual feet frontage of the land on each side of the highway ordered as aforesaid to be improved, excepting therefrom the spaces occupied by the highways crossing the same, had been obtained, and in view thereof, resolved and determined that the improvement be made, and that bonds of the Town of Tonawanda to the amount of two hundred and thirty-two thousand, six hundred dollars be issued by said town for the purpose of obtaining money to make said improvement, and that such bonds be sold for that purpose and the moneys used in making said improvement, and that said bonds were so issued and sold and the moneys realized from the sale of said bonds were used in making said improvement petitioned for and consented to by the Columbia Land Company as aforesaid, which improvement and bonds are the same improvement and bonds mentioned in the complainant's bill in this suit.

Thereupon the Town Board of the Town of Tonawanda proceeded in the manner and form specified in said Chapter 550 of the Laws of New York of 1893 to assess the moneys necessary to pay said bonds upon the said parcels of land fronting and bounding upon that part of the said street or highway improved as aforesaid.

That pursuant to Section 6 of Chapter 550 of the Laws of 1893, the said Town Board caused the list of said lots or parcels of land, mentioned in the said bill, to be made and filed, and that thereupon the notice, prescribed by said Section 6 in said statute, was given to all persons interested, that the said Board would meet at a time and place which were specified therein, to hear all objections, which should be made to said list or assessment, and and that at the time and place specified in and by said notice the said Town Board did meet to hear and consider such objections, but that neither the said Columbia Land Company nor the complainant, nor any person in privity of estate, or either of them, appeared or made any objections to the said list. That thereupon the said list was, as alleged in the bill, affirmed and filed and a copy thereof delivered to the Supervisor of the Town of Tonawanda, William J. Rogers, who was the predecessor of the defendant Patton, as Supervisor of said town; that the said Supervisor proceeded to collect said assessments and to apply the same in payment of principal and interest as the same became due, pursuant to the provisions of said bonds, and did threaten to advertise and sell such lands, so assessed as aforesaid, as should be necessary to raise the moneys necessary to pay said bonds, and that the Supervisor of said town for the time being continued to make collections of the instalments of said assessments until on or about the 29th day of May, 1895, when Chapter 816 of the Laws of the State of New York of 1895 was approved by the Governor and became of force, and that thereupon the Town Board of the Town of Tonawanda proceeded to re-assess the moneys necessary to pay said bonds as aforesaid, pursuant to the direction contained in section 27 of the statute last mentioned.

That the said Board caused an assessment roll to be made and filed, as mentioned in the bill, and pursuant to Section 44 of the statute last mentioned the said Town Board caused notice to be published that at a time and place, which were specified therein, the Board would meet and hear and consider any objections which might be made to the said roll, and that at the time and place, which were so specified in said notice, the said Board did meet and heard and considered such objections as were made to the said assessment roll, and did consider and act on all such objections as were made to the same, and that neither the complainant in this suit, nor any person with whom he is in privity of estate, appeared before the said Board at said time and place or made any of the objections mentioned in the bill of complaint, or any objections whatsoever, to the said assessment roll, or to the said assessment.

That thereupon, and on or about the 12th day of August, 1895, the said Board affirmed the said assessment roll, and that thereupon the said assessment roll was filed and delivered for collection, being the same assessment roll mentioned and described in the bill herein.

And that thereupon the Supervisor of the Town of Tonawanda accepted the said assessment roll and assumed the collection of said assessments, and that the assessment made under pursuant to the provisions of Chapter 550 of the Laws of 1893, as aforesaid, was abandoned.

That under and pursuant to the provisions of Section 46 of Chapter 816 of the Laws of 1895, aforesaid, any person interested who shall have appeared before the Town Board and made his objections at any hearing provided for in that statute, and who shall consider himself aggrieved by the action of the Board, may within 20 days thereafter have a writ of certiorari for a review of the decision or action of the Board in the Supreme Court of the State of New York pursuant to the general procedure of that court.

And these defendants allege and show, that neither the complainant in this action, nor any person with whom he is in privity of estate, took any action whatsoever under that part of the statute last mentioned for the review of any of the said decisions of the Town Board of the Town of Tonawanda upon any ground mentioned in the bill herein, or upon any other account whatsoever.

These defendants further allege and show upon information and belief that by Article 7, Title 2, Chapter 16 of the Code of Civil Procedure of the State of New York, the Supreme Court of the State of New York has and during all the times mentioned herein has had jurisdiction and power in proceedings at law to review every order or determination of the Town Board of the Town of Tonawanda which was made under and pursuant to the provisions of either of said statutes, and these defendants allege that the complainant in this suit did not, nor did any person with whom he is in privity of estate, take any proceedings at law whatsoever under or pursuant to the said Article 7, Title 2 of Chapter 16 of the Code of Civil Procedure, to review any of the orders or determinations which were made by the Town Board of the Town of Tonawanda under or pursuant to the provisions of statutes of 1893 and 1895, or of either of them.

These defendants further show that no action at law, or suit in equity, was commenced in the State, or other courts, for the purpose of setting aside said assessment roll on any ground whatsoever, or for any other relief or judgment concerning the same until on or about the 5th day of February, 1896, when a suit was instituted by the service of a summons and complaint by Joseph T. Jones, the owner of a parcel of land included in said assessment, in the Supreme Court of the State of New York for the purpose of having said assessments adjudged illegal and void and of enjoining the enforcement of the said assessments. That no application for an injunction *pendente lite*, restraining the said Supervisor or enjoining him from collecting said assessments, was made in that suit until on or or about the 22nd day of Aug-

ust, 1896, when notice of an application for such an order was served in the said case of Joseph T. Jones against the said town; that until that motion was noticed as aforesaid no arrangement, agreement or understanding of any name or nature whatsoever was made by the said town, or by any person on its behalf, that any proceedings in reference to said assessment should be suspended until the result of the said suit, or any other suit in said Court, or any other Court, could be determined, or until the Legislature of the State of New York should make some new or further enactment in reference to said assessment, but that the said successive Supervisors of the Town of Tonawanda were endeavoring to collect said assessments, and that the defendant Patton, as such Supervisor, was about to advertise the lands, the owners of which had made default in payment of said assessments, including the lands of the plaintiff in this action, for sale to pay said assessments when said motion for said injunction *pendente lite* was noticed in said Jones case aforesaid.

That this complainant did not commence any suit in the Supreme Court of the State of New York, or elsewhere, to have said assessments declared illegal or void, or to restrain or enjoin the collection of them, or either of them, *until on or about the 8th day of March, 1899.*

That a large number of suits were commenced by owners of the property assessed as aforesaid, and persons interested therein, in the Supreme Court of the State of New York for the purpose of having said assessments adjudged void and of enjoining the enforcement thereof, but that all of said suits have been dismissed by the Supreme Court of the State of New York, most of them because the plaintiffs in each of said suits were not prepared to proceed to trial when the cases were reached and the trial thereof moved by these defendants.

These defendants further allege and show, that two installments of principal and interest, which became due and payable on said bonds in 1894 and 1895, have been paid; that certain of the owners of property assessed for the improvement as aforesaid have made all payments which have become due on their assessments; that the defendant, the Town of Tonawanda, has raised by general tax the moneys necessary to pay a part of the said two installments of 1894 and 1895, which payments were made before any suit at law or in equity was commenced to have said assessments adjudged void, or to restrain or enjoin the collection of them. That all of said bonds have been sold, and some have been re-sold, and that many of them are owned by Savings Banks, representing trust funds, and a large number of them are owned by the State of New York, and that said bonds were acquired by the State and by said banks and trust companies before any suit or litigation was instituted or commenced, adjudging or questioning in any manner the validity of said statutes or of said assessments or of said bonds.

That the complainant and his predecessor in interest and all others interested as owners, and otherwise, in the lands so assessed, have been guilty of *laches* in not making or asserting any claim that said assessments or proceedings, or the statutes under which they were taken, or the said bonds, were void or illegal, as hereinbefore more fully specified, until investments have been made and proceedings have been taken and interests have become vested as above mentioned in reliance on the validity of said statutes and proceedings, which it would be inequitable and unjust to now disturb, and which proceedings would not have been taken, which investments would not have been made and which rights would not have become vested, had not the Columbia Land Company and others filed the said petition and consent with the Town Board of the Town of Tonawanda and induced it to take the proceedings in making the improvement and the assessment, and issueing and selling the bonds aforesaid.

Third. That there are eighty-four (84) separate parcels of real estate included in said assessment roll. The owners and persons interested in most of these parcels are residents of the State of New York and within the jurisdiction of this court. The defendants are subject to separate suits by the owners and persons interested in each of said parcels. The owners of said bonds are, so far as known to these defendants, within the State of New York and the jurisdiction of this Court. The rights of the owners of these bonds must necessarily be affected by any order or decision which may be made in this suit pursuant to the prayer of the bill, as it is sought to restrain and enjoin the defendants in this action from raising the moneys necessary to pay the said bonds, principal or interest.

These defendants are also subject to suits by the different owners of these bonds for their enforcement, and the State of New York, by its Comptroller and Attorney General, has already threatened to commence proceedings, either by action at law or mandamus, to compel the payment of the interest and of that part of the principal of the bonds now owned by the State which has become due and is payable.

And these defendants allege that the complainant should not be allowed to have or maintain this suit unless the owners of all lands so assessed as aforesaid and the owners of said bonds be made parties to this suit. That all controversies concerning the subject matter of this suit be determined and adjudged.

The case was brought on for a final hearing on stipulated testimony and the affidavits, before Hon. Alfred C. Coxe, Judge, who directed the final decree pursuant to the prayer of the Bill. Thereupon the appellants filed Assignment of Errors, appearing at pages 50 to 53 of the Record, and perfected their appeal to this Court.

The new assessment roll, made under Chapter 816 of the Laws of New York of 1895, was for the same cause and upon the

same lands as the assessment made under Chapter 550 of the Laws of New York of 1893. That this was authorized by the Law of 1895 has been decided by the Court of Appeals of New York.

*Jones vs. Tonawanda*, 158 N. Y., 438.

*Errors Assigned.*

The decree is alleged to be erroneous in that it over-ruled.

1.—The claim that the plaintiff is estopped by the affirmative act of his immediate predecessor in title in petitioning for the improvement which caused the expense for which the assessment is made, and by the acquiesance of the mortgagee on the fore-closure of whose mortgage the plaintiff took title in the making of the improvement, and his failure to appear or object to the improvement at any of the hearings directed by the statutes and held by the Town Board.

2.—In over-ruling the claim that the plaintiff is precluded from the relief for which he prays because of long delay in asserting his objections to the improvements which were made in 1893; whereas, this suit was not begun until September, 1899.

3.—In over-ruling the defendants' claim that if the statute and proceedings are unconstitutional and void the invalidity appears upon the face of the proceedings constitute no cloud upon plaintiff's title and no grounds for relief in equity.

4.—In over-ruling the claim that the plaintiff has had and has now full, adequate and complete remedies at law.

5.—In over-ruling the claim that material and necessary parties to a proper and complete determination of the controversy were not before the Court.

6.—In holding that the mere fact that the assessment was levied upon each parcel according to its frontage rendered the assessment void, without any evidence as to whether this was done after a prior determination that each parcel was benefited by the improvement to the extent of the amount thus assessed. The Court thus reversing the presumption that the official acts of the Legislature and of municipal boards result from correct procedure.

7.—The Court erred in holding and deciding that the complainant by his bill makes a case which entitles him in a Court of Equity to relief against the defendants, or either of them, touching the matters contained in the said bill.

These points are taken by the demurrer, plea and answer, and in the assignment of errors filed.

## POINTS OF LAW.

1.

**The plaintiff is estopped from maintaining this suit by the affirmative act of his immediate predecessor in title in petitioning for the improvement which caused the expense for which the assessment is made, and by the acquiesence in the making of the improvement of the mortgagee on the foreclosure of whose mortgage the plaintiff took title, and by the plaintiff's delay in commencing this suit.**

While the improvement was made under the law of 1893 and the final assessment was made under the Law of 1895, these acts were all in the same proceeding and each was designed to contribute to one result, which was the making of the improvement and paying for it. It was always believed that the improvement was of local benefit and expected that the expense should be raised by local assessment, and all that was done under either statute was in furtherance of this theory.

Therefore, in considering this point, which is addressed to the judicial discretion of the court, the entire history of the transaction should be considered that the court may see whether the plaintiff's claim may find support in equity.

I understand the practice to be such that when this case was brought on for hearing upon the pleadings, new matter in the defendants' pleadings is taken as true, and in arguing this point I refer to this matter as admitted.

*Banks vs Manchester*, 128 U. S., 244, (at page 251.)

When this court has learned and considered the opportunities which the plaintiff and his predecessor in title, with whom he is in privity, have had of which they have not availed themselves to redress any pretended grievance, how rights and interests have become vested in the confidence that these proceedings were valid, and how the commencement of this action was delayed, I am sure that this point will be deemed well taken.

The first three sections of Chapter 550 of the Laws of 1893, of the State of New York read as follows:

"§ 1. The town board of said town of Tonawanda is hereby authorized to meet, ascertain and determine the probable expense of grading, gravelling, macadamizing or paving any highway extending from the village of Tonawanda to the city of Buffalo with stone or other material. The cost of plans, estimates, assessments, surveys, publications, and all expenses incidental to the making of any such improvement shall be considered as a part of the expense thereof. The said board, after the making of any determination as aforesaid, shall cause an order to be entered in the minutes of the said board, reciting in general terms the improvement proposed, with the materials to be used, and the estimated expense thereof, together with the highways upon which it is proposed to make such improvement, as well as any

other matter which said board may deem necessary and material. A copy of said order shall be published once a week for two weeks in a newspaper printed in the village of Tonawanda. Said order shall also contain a notice notifying all persons interested in said improvement to appear before said board at a time and place to be specified therein, which shall not be less than ten days after the first publication thereof, to make such objections as they may have to such improvement, which order and notice, in addition to being published as aforesaid, shall be posted conspicuously in at least three public places in said town, not less than ten days prior to the date to be specified therein for the hearing of objections as aforesaid. The said order and notice shall be signed by the chairman of the town board of said town.

"§ 2. At the time and place to be specified in the notice mentioned in the last preceding section, or at such time and place as the said town board shall adjourn to from time to time, it shall give all persons appearing to object to said improvement, or to be heard in reference thereto, a reasonable hearing, and thereupon may reverse, affirm or modify the said order as the said board may deem proper.

"§ 3. After such hearing, if the said town board shall determine that it is necessary and proper to improve any highway, or any part of any highway, leading from the village of Tonawanda to the city of Buffalo as aforesaid, by grading, gravelling, macadamizing or paving the same, it shall thereupon make an order or determination to that effect, which shall also be extended in the minutes of the said board, which order shall also contain the particular highway or highways, or parts thereof, to be improved, the material to be used, and, so far as may be, the time and manner in which said improvement is to be made; and also a provision that all such improvements are to be done by contract, to be let after due notice thereof to the lowest responsible bidder."

It is undisputed in this case that on or about the 3d day of July, 1893, The Columbia Land Company, the then owner of the lands described in the bill of complaint, filed with the town board a written petition, signed by itself and others, wherein the signers petitioned the said board to order that part of said highway or street mentioned in the complaint "to be paved forty feet in width "pursuant to the provisions of chapter 550 of the Laws of 1893 "authorizing the paving of streets in the town of Tonawanda," and "that thereupon, and on said 3d day of July, 1893, the town "board of the town of Tonawanda initiated the proceedings "mentioned in said petition."

(Plea folio 31 and 32; answer folio 47).

It is also undisputed that the notice required in section 1 of the act, and the hearing mentioned in section 2 of the act, were had; and that all persons who had any objections to the making of the improvement were heard, and their objections were considered, and that after the notice and hearing and deliberation the

board made an order in the form prescribed by section 3 of the act, which described the improvement made as mentioned in the bill.

Section 4 of chapter 550, Laws of 1893, provided as follows:

"When any such improvement shall have been determined "upon and ordered as aforesaid, the same shall have no force or "effect until the consent in writing shall be obtained of the owners "of at least one-half of the actual feet frontage of land on each "side of any highway ordered as aforesaid to be improved, ex- "cepting therefrom the space occupied by highways crossing the "same."

It is also admitted that on or about the 19th day of July, 1893, The Columbia Land Company, then being the owner of the plaintiff's lands, filed with the town board another writing intended to satisfy the provisions of section 4, aforesaid, wherein it was recited that the town board had "in pursuance of chapter "550 of the Laws of 1893 duly ascertained and determined the "expense" of the improvement, and "having duly met and heard "all objections offered by any party interested in said improve- "ment, and said board having thereupon and on the 25th day of "July, 1893, duly ordered and determined" to make said improvement, further continued as follows:

"Now, therefor, in pursuance of section 4 of said chapter 550 "of the Laws of 1893, we, the undersigned, being the owners, of "more than one-half the actual feet frontage on each side of said "highway to be improved as aforesaid (excepting therefrom the "space occupied by highways crossing the same), do hereby con- "sent to said improvement as ordered, hereby ratifying and "confirming the action of said town board in the regard "mentioned." (Plea folio 33; answer folio 47).

Section 5 of chapter 550, aforesaid, provided.

"When any such improvement shall have been ordered "as aforesaid, and the consent of the property-owners shall have "been duly obtained, in the manner and form aforesaid, the town "board is hereby authorized and empowered to cause to be issued "bonds of the said town for the providing of funds for the pay- "ment of the expenses thereof or any part thereof, and thereby to "pledge the faith and credit of said town to the extent and "amount of such bond or bonds, the same to bear interest at a "rate not to exceed six per centum per annum, and to be for such "amounts and upon such terms and conditions as may be deter- "mined by the said board."

And it is admitted that the town board, on receiving the said written consent, and on due deliberation, determined that the consent in writing of the number of property-owners required by section 4 of chapter 550, aforesaid, had been given, that the improvement should be made, and issued bonds to the amount of two hundred thirty two thousand six hundred dollars ($232,600), which were sold, and which have passed into the hands of holders

in good faith, excepting only such notice as may be imputed to them of the invalidity of the law, if it was invalid, and that the street between the city of Buffalo and the village of Tonawanda, in the town of Tonawanda, was graded, curbed, paved and drained at the expense mentioned in the bill and plea of over three hundred thousand dollars ($300,000).

The road has been in general use continuously since 1892. (*Fols.* 5-8 of Bill, and Plea, *fols.* 34-35; Answer, *fol.* 47).

Section 6 of Chapter 550 of the Laws of 1893 provided:

§6. "When the town board shall have duly affirmed the order proposing any such improvement, and finally determined upon the same, and after the execution and sale of said bonds for the purpose of providing for the payment and expense of said improvement in the manner aforesaid, then for the purpose of providing for the payment and discharge of said bonded indebtedness, they shall cause a list of all the several lots or parcels of land to be subjected thereupon, and bounding on any highway to be improved, to be made which shall describe each parcel or lot thereof, so that it can easily be identified and distinguished, and specifying the number of lineal feet of its frontage or boundary on that part of the highway to be improved. Such list shall be filed with the town clerk who shall thereupon give public notice of the completion and filing thereof by publication of such notice at least once in a newspaper published in said village, if one be published therein, and by posting only if no newspaper be published therein, and said notice shall contain a provision that any objections to the accuracy or form of such list may be made to the town board at their next meeting therein stated to be held not less than ten nor more than twenty days after said notice shall be first published and posted as aforesaid. If such notice be given, and no objections are made, the said list shall become and be final and conclusive by the acquiescence of the parties concerned. All objections which shall be made pursuant to such notice, the said board shall consider and determine upon, and may affirm or reverse said list, or amend the same, or correct any error therein, or annul the same and proceed anew, and when the said Board shall have affirmed a list it shall become final and conclusive upon all parties concerned."

And it is conceded that the notice and hearing provided for in that part of Section 6, above quoted, were given and had. (Plea, *fol.* 35; Answer, *fol.* 47).

It is also admitted that the assessment-roll was completed, delivered to the supervisor for collection, and that the supervisor of the town continued to collect installments as they became due until the 29th day of May, 1895, when Chapter 816 of the laws of that year became of force by the Governor's approval. (Plea, *fol.* 35; Answer, *fol.* 47).

Section 27, Chapter 816, Laws of 1895, provided as follows:

"Where any highway or part of highway within any such

"town has been paved or otherwise permanently improved under "any law providing for the assessment of the expense of such im- "provement locally, such highway shall be subject to the control "and management of said board, and where any part of the ex- "pense of making such improvement, including interest on "moneys borrowed, and all other incidental expenses in anywise "appertaining to the making of the improvement, or money bor- "rowed for that purpose by the town, shall remain unpaid at the "time that this act goes into effect, for the purpose of defray- "ing such expenses and of repaying the moneys borrowed, said "board is hereby authorized and empowered, and it shall be its "duty to cause to be assessed the entire expense of the improve- "ment aforesaid upon the several lots or parcels of land fronting "or bounding upon that part of the highway so improved as "aforesaid, and in the manner provided by this statute for mak- "ing local assessments for raising the expenses of grading and "paving of streets; and pursuant to the rules of apportionment "and division of the expense herein provided. And all such pro- "ceedings shall be had for reviewing, confirming, correcting or "annulling such assessment as are provided by this statute in "cases of assessment for like improvement made under its provis- "ions, and any assessment which may be made under the "provisions of this section, for all purposes of making, re- "viewing, confirming, correcting or annulling the same, "shall be regarded as if said improvement was made under "and by virtue of the provisions of this act; except that where "bonds of the town have been issued and sold to obtain money "for the purpose of making said improvement, said assessments "shall be so made by said board as to become due and collectible "at the times and in the amounts necessary for the payment of "said bonds as they shall become payable, principal and interest."

The Court of Appeals of the State of New York has held that said section 27 applied to the assessment which had been previously made for the improvement of the Delaware road or street under the act of 1893, as aforesaid.

See Jones v. Town of Tonawanda, 158 N. Y. 438, 665.

It is admitted that upon chapter 816 of the Laws of 1895 becoming of force, as aforesaid, the town board proceeded to re-assess the expense of the improvement of the Delaware road, and caused an assessment-roll to be made and filed, which was filed pursuant to section 44 of the statute. (Plea folio 36; answer folio 47.)

Section 44 reads as follows:

"The engineer and surveyor shall file the assessment-roll, "when complete, with the town clerk, and thereupon it shall be "the duty of the board to cause notice to be published in the "official paper that the said assessment-roll has been completed, "and that at a time and place to be specified therein, the board "will meet and hear and consider any objections which may be

"made to the said roll. Said notice shall be published in the "official paper. The first publication thereof shall not be less "than ten nor more than twenty days before the time to be speci- "fied therein for the hearing. At the time and place to be so "specified, the board shall meet and hear and consider any "objections to the assessment-roll, and may change or amend the "same if they deem it necessary or just to do so, and may affirm "and adopt the same as originally proposed or as amended or "changed, or they may annul the same and order the engineer "and surveyor to proceed anew and prepare another list; in "which case, when completed and filed, they shall proceed to give "notice and hear and consider objections as in the first instance, "and shall possess the same powers as in the first instance to "review, correct, amend and affirm the roll."

It is admitted that the notice and hearing, which this section provides for, were given and had, and that neither the complainant nor any person with whom he is in privity of estate appeared before the board or made any objections to the assessment or the assessment-roll. (Plea folio 36; answer folio 47).

Section 46 of the statute reads as follows:

"Any person interested who shall have appeared before the board and made his objections at any hearing provided for in this statute, and who shall consider himself aggrieved by the action of the board, may, within twenty days thereafter, have a writ of certiorari for a review of the decision or action of the board from the supreme court, pursuant to the general procedure in that court. The court may review the action of the board, and if it decides that any injustice or error has been committed, may annul the proceedings and direct the board to proceed in the matter *de novo*, or may specify the correction which should be made and compel such correction by the board; and the court may, in its discretion, upon or after granting the writ, stay the proceedings of the board upon motion of the petitioner and upon such security or conditions and notice to the board as may seem proper until the final decision on the petition."

It is admitted that the complainant, nor his predecessor in title, did not avail themselves of any of the remedies afforded by these statutes for the review or revision or abandonment of the proceedings of which they now complain. By their acquiescence of others, similarly situated, the town board, the purchasers of the bonds, and the other taxpayers of the town, were led to believe that the property-owners, including the complainant's predecessor in title, were desirous of having the improvement made and were willing to meet the obligations which it imposed; and on the 12th day of August, 1895, the new assessment-roll was affirmed by the town board of the town of Tonawanda. (Plea folios 36-37 and answer folio 47.) And that thereupon the supervisor of the town proceeded to collect this assessment-roll and continued without interruption until on or about the 22d day of

August, 1896, when an attempt was made in a suit which had then been pending six months, to obtain an injunction restraining the supervisor from selling some of these lands. (Plea folio 37-38; answer folio 47.)

This was three years after the improvement was made and the bonds sold and the first assessment-roll made, and over a year after the second assessment-roll had been made. The complainant commenced no suit in any court to have the validity of these proceedings brought in question until the 8th day of March, 1899 (Plea folio 38; answer folio 47); nearly six years after the improvement and the original assessment had been made.

In the meantime the bonds had been sold and resold and passed into the hands of trustees and public officers. The town had made two payments on the bonds but raised some of the moneys necessary by general tax upon the property in the town. (See Plea folios 38-39; answer folio 47).

Although the plaintiff, and those similarly situated in reference to this improvement, commenced a large number of suits (folio 38 of Plea), it is alleged in the bill, and admitted, that "in "none of said actions in the State courts was the allegation made "or litigated that the statutes of 1893 and 1895 were unconsti-"tutional and void under the provisions of the Constitution of "the United States."

And these questions were first presented by the bill in this suit, which was verified the 8th day of September, 1899, over six years after the improvement and the original assessment were made, and over three years after the reassessment of 1895.

The proceedings, it will be observed, were open, notorious and were given great publicity, so that they were known to The Columbia Land Company and to the complainant from the day of their inception.

In view of this knowledge and of the long delay and the numerous opportunities for redress, should the complainant be granted relief which will result in rendering invalid the bonds, which, with principal and interest, amount to over $400,000, and assessments in a corresponding amount, or which if it be adjudged that the bonds are valid and the assessments void, will result in a burdensome tax upon property holders in the town of Tonawanda, and which in many obvious ways will disappoint the expectations and unsettle the arrangements of a very large number of people.

Pierce v. Somerset Ry. Co., 171 U. S. 641.
Evers v. Watson, 156 U. S. 521.
White v. Miller, 158 U. S. 128.
Johnson v. Atlantic, G. & W. I. Transit Co., 156 U. S. 618.

One "having notice, and failing to object and arrest the "improvement until the benefit has accrued, will be deemed to "have ratified the proceedings as fully as does one who receives the

"proceeds of a judgment or sale, with knowledge of inherent "infirmities which render it voidable, or even void."

Crawfordsville Music Hall Assn. v. Clement (App. Ct. of Ind.), 38 N. E. Rep. 228.

"When such owner knew, while the improvement was in "progress, that the street grade was to be raised, and knew of "the assesment shortly after it was made, yet waited for nearly "two years before applying for his writ, it is such delay as, under "the circumstance should lead to a dismissal of the writ."

Sup. Ct. of N. J., Stewart vs. Mayor, etc., 31 Atl. Rep., 278.

In a similar case to ours, the Supreme Court of Iowa said:

"The claim is now made that some basis of apportionment, "as according to the frontage of the lots assessed on the improv- "ment made, should have been adopted in advance of the reas- "sessment. Whether the objection is well founded, we do not de- "termine. As based upon the facts of this case, it is, at most, "purely technical. If it had any merit, it should have been made "pending the reassessment, when opportunity for the correction "of errors was offered, and will not be given weight now."

Tuttle v. Polk, 60 N. W. Rep. 738.

All the objections to the proceedings present questions of law only. The objections were as obvious six years ago as when this suit was commenced.

Of a case somewhat similar to this, Judge Danforth, writing the opinion of the Court of Appeals, of N. Y., said:

"It is obvious that these objections existed, if at all, at the out- "set of the proceedings, and when Collins as a property-owner was "before the court they might have been presented in opposition to "the application and motion which resulted in the order of Decem- "ber 13th. If they had any merit and he intended to rely upon them, "it was his clear right and duty to bring them forward at the "first opportunity. But he was not bound to mention them at "all." * * * "It is very well settled that a party may waive "a statutory and even a constitutional provision made for his "benefit, and that having once done so he cannot aftewards ask "for its protection. (Lee v. Tillotson, 24 Wend. 337; Embury "v. Conner, 3 N. Y. 511; Cooley's Const. Lim. 181.) The appel- "ant is in this position. He participated as an actor in procuring "the order which he now seeks to set aside, and took his chance "for a satisfactory valuation of his property for the purpose con- "templated by the act. To that end there was not only acquies- "cence on his part, but intelligent and efficient dealing with the "matter and consent to the order. By this consent he must be "deemed to have made his election and should be held to it."

Matter of Application of Cooper, 93 N. Y. 511, 512.

"A party may waive a rule of law, or a statute, or even a "constitutional provision, enacted for his benefit or protection, "where it is exclusively a matter of private right, and no consid-

"erations of public morals are involved, and having once done so "he cannot subsequently invoke its protection."

Mayor, etc., of New York v. M. R. Co., 143 N. Y. 26.

"But a party may waive a rule of law or a statute, or even a "constitutional provision enacted for his benefit or protection, "where it is exclusively a matter of private right, and no consid- "erations of public policy or morals are in involved, and having "once done so he cannot subsequently invoke its protection."

Sentenis v. Ladew, 140 N. Y. 466. See also Vose v. Cockcroft, 44 N. Y. 415.

These cases cited clearly establish that even the acquiescence of the parties with knowledge that the proceedings were being made for so long a period of time, would be sufficient waiver of any of the objections which this complainant now seeks to interpose. But the affirmative action of those, with whom the complainant is in privity, in filing the written petition and consent, which lead the Town Board to take the action now complained of clearly manifested such election and acquiescence that the proceedings be taken as would preclude the complainant from the relief which he seeks even if his suit had been brought sooner.

"The plaintiff was one of the petitioners for the improvement. "The only power the city had in the premises was to do the "work at the cost of the abutting owners, to be apportioned "among them according to frontage. He necessarily asked that "the work be done under that statutory rule, and thereby waived "any question as to its constitutionality. A party may waive the "benefit of a constitutional provision in his favor. (Vose vs. "Cockcroft, 44 N. Y., 415)."

*Conde vs. City of Schenectady*, 164 N. Y., p. 263.

"It is well settled as a general proposition, subject to certain "exceptions not necessary to be here noted, that where a party "has availed himself for his benefit of an unconstitutional law, "he cannot, in a subsequent litigation with others not in that "position, aver its unconstitutionality as a defense, although "such unconstitutionality may have been pronounced by a com- "petent judicial tribunal in another suit. In such cases the prin- "ciple of estoppel applies with full force and conclusive effect."

Daniels vs. Tearney, 102 U. S. 421.

Numerous cases are cited, after which the court continues:

"In the case first cited, an injunction was applied for to pre- "vent the collection of a tax authorized by an act of the legisla- "ture passed during the late civil war, to enable the people of a "county to raise volunteers and thus avoid a draft for soldiers, "and that object had been accomplished. In disposing of the case "the court well asked, 'Upon what principle of exalted equity "'shall a man be permitted to receive a valuable consideration "'through a statute, procured by his own consent or subsequently "'sanctioned by him, or from which he derived an interest and

"consideration, and then keep the consideration, and repudiate "the statute?'"

Here The Columbia Land Company sanctioned the statute by its petition and written consent filed to obtain a benefit and consideration in the improvement of its property. The mortgagee acquiesced in it and allowed his security to be improved. Now their successor in title, with them in privity, comes into this court *in equity*, asking to be allowed to keep the improvement and the benefit, which resulted from the petition and consent, but to repudiate the burden which it involved. It seems as if it would be unnecessary to proceed further in the consideration of this case.

As between vendor and purchaser, "a principle of common "justice forbids that one shall be permitted to lead another to act "upon a contract of purchase with him, and incur expenses by "reason of it, and then, upon some pretext of a defect in a matter "of form, refuse compliance with its provisions, and thus deprive "the purchaser of the benefit of his labor and expenditures. "Courts of equity in such cases interfere and compel the vendor "to keep his engagements."

Union Pac. Ry. Co. vs. McAlpine, 129 U. S. 305.

Again, "The improvement has been completed. All the com-"munity is enjoying its advantages. All the real estate in the "borough, including that of the plaintiffs, has been enhanced in "value thereby. The borough has become obligated to pay "therefor the sum of $100,000, individuals have been assessed for "$25,000 more, and of that amount the sum of $22,000 has "been paid; of the unpaid balance, over $600 is assessed upon the "plaintiffs. They, while enjoying the advantages of the improve-"ment, without showing that the assessment against them is "unjust, call upon the court to interfere in their behalf and excuse "them from paying their just and reasonable proportion of the "cost. Is that a case which commends itself to the favorable con-"sideration of the court? Will it be a wise exercise of the discre-"tion of the court, upon the mere suspicion of an improbable "possibility, to declare this assessment void and thereby throw "this community into the confusion and embarrassment which "must surely follow?"

Ferguson vs. Borough of Stamford, 60 Conn. 445, 446.

In the lower court the plaintiff in argument, denied any privity between himself and the Columbia Land Company and claimed to be in privity only with the mortgagee. The history of his title appears in a stipulation which has been given in evidence.

By this stipulation it appears that William F. Sheehan took title to the premises in trust for himself, and the plaintiff in this action, and another, on the 5th day of October, 1891; that on that day Sheehan executed certain mortgages upon the premises to secure a part of the purchase money. That subsequently Sheehan conveyed the equity of redemption in the lands to one Hurlburt who subsequently conveyed them to the Columbia

Land Company. That subsequently the mortgages given in 1891 by Sheehan were foreclosed, and that the plaintiff, Lyon, obtained his title on the foreclosure sale, and the plaintiff contends that there is no privity between the Columbia Land Company and Lyon; that the title, which Lyon now holds to the premises, was derived under the mortgage which was superior to the estate or interest of the Columbia Land Company in the premises at the time the latter petitioned for, and consented to, the improvement in question.

The plaintiff's counsel attaches more importance to these facts than they deserve. Counsel quoted from Greanleaf on Evidence as follows:

"The term 'privity' denotes *mutual or successive relationships* to the same rights of property."

Lyon has succeeded to the rights or relations to the property of the owners of the mortgages and of the Columbia Land Company as owner of the equity of redemption at the time the improvement was made.

Lyon is in privity with both the mortgagee and the owner of the equity of redemption. Both the owners of the mortgage and the owners of the equity were effected by the assessment proceedings. The value of the property, in which both were interested, was affected by the improvement. The value of the mortgage security was increased by the improvement, and the value of the equity of redemption was increased by the improvement, and the expense of the improvement under both statutes attached to, and become a lien superior to the estate or interest of the mortgagee and the owner of the equity of redemption.

"When such list" (assessment list) "shall have become "affirmed or final as aforesaid, the amount to be raised concern-"ing which said list shall have been made, shall become a lien "superior to all other rights, title or estate therein, upon, and to "raised from the several lots or parcels of land respectively speci-"fied thereon." (Chap. 550, Laws of 1893, Sec. 6, page 1180).

"Each installment appearing upon such assessment roll shall "become a lien at and from the time that the same become pay-"able upon the parcel of real estate upon which the same shall be "assessed, prior and superior to all other claims, liens, estates or "interests therein." (Chap. 816, Laws of 1895, Sec. 45, page 1774).

All the estate or interest which Mr. Lyon now has in the premises was affected by the assessment proceedings, and the notice which the statute required to be given, and which was given, was to "all persons interested in said improvement to appear before said board at a time and place" specified to appear and "make such objections as they may have to such improvement."

(Section 1, chap. 550, Laws of 1893, also Section 44, chap. 816, Laws of 1895.)

It was not necessary for the Legislature to require either a petition or a consent; it was sufficient that a notice and a hearing were given to all persons interested to constitute a valid assessment and to bind all estates and interests in the land. The Legislature did, however, provide that before the assessment could be made the owners of the majority of the property should consent in writing.

The owner of the mortgages in this instance had notice of the statute, had the notice required by it, knew the effect of the written petition and consent of the owner of the equity of redemption, knew that the improvement was being made, knew that it was contemplated to make an assessment for the expense, and stood idly by, as did the owner of the equity of redemption, until all the rights of bondholders, taxpayers and others had become vested; suffered the improvement of their estates and interests in the land to be enhanced by the pavement without objection, and now over six years afterward, seek to repudiate the burden which that improvement entailed. They are all in the same relation to this improvement and to the proceeding guilty of *laches* which precludes their right to recover in this case.

## II.

**If the Statutes and Proceedings are unconstitutional and void, this invalidity appears upon the face of the Proceedings, constitute no cloud upon the plaintiff's title, and any attempt to enforce the assessment would be a trespass for which an adequate remedy at law exists, and, therefore, a bill in equity for an injunction cannot be maintained.**

*These objections were not interposed in the Norwood vs. Baker case.*

Equity only interferes in assessment cases "where the assess-"ment on the face of the proceedings was valid, and extrinsic "evidence would be required to show its invalidity."

Dows vs. City of Chicago, 11 Wall, 111.

"A proceeding which is upon its face not only illegal but "absolutely void, does not constitute a cloud upon the title to "real estate against which a court of equity will relieve."

Wiggin vs. Mayor of N. Y., 9 Paige, 16.

If the statute is unconstitutional it cannot, as the complainant apprehends it may, create any cloud upon his title and the recitals in the deed are of no consequence whatever, since the statute, which purports to give them consequence, is void on its face. The complainant has simply to continue to possess and enjoy his property, and if any person undertakes to disturb him by virtue of anything which may be done under an absolutely void statute, his defense at law is always available and the town must respond for his damages. Under such circumstances a suit in equity will not be maintained.

"We shall examine and consider but one question, which we "deem decisive of this case, and that is whether the act authoriz- "ing the assessment was constitutional. If it was unconstitu- "tional, no valid assessment could be made under it; and the in- "validity of the assessment would always appear, and it could "constitute no such cloud upon title as to call for the interference "of a court of equity."

Stuart vs. Palmer, 74 N. Y. 187, 188.

The very latest decisions of the Court of Appeals of New York reiterates this doctrine.

Conde vs. City of Schnectady, 164 N. Y., 258.

"Where the invalidity will necessarily appear in any proceed- "ing taken to enforce title under it" (tax deed), then the jurisdic- "tion of a court of equity cannot be invoked to set it aside. "Then the owner must wait until his title is actually assailed "under the lien, and his defense will always be at hand."

Townsend vs. The Mayor, 77 N. Y., 546.
Preston vs. Smith, 26 Fed. Rep. 885.
Marsh vs. City of Brooklyn, 59 N. Y. 280.
Guest vs. City of Brooklyn, 69 N. Y. 506.

The town is perfectly solvent and capable of responding in damages for all the injury which an attempt to enforce the assessment may cause the complainant.

Schulz vs. City of Albany, 59 N. Y. Supplement 235; citing Stebbins vs. Kay, 123 N. Y. 31.
May vs. Traphagen, 139 N. Y. 478.
Bruecher vs. Village of Port Chester, 101 N. Y. 240.
See, also, Rickcords vs. City of Hammond, 67 Fed. Rep. 380.

The statute, chapter 816, Laws of 1895, section 48, center of page 1776, gives him a year in which to redeem his lands after the sale.

"During said year, any person or persons interested in said "lands so sold, may redeem the same from the sale, by paying to "the supervisor the full amount of the bid and interest at the rate "of one per centum per month, to be computed from the day of "sale to ten days after the day that the property is so redeemed."

## III.

### The Assessment is Valid

The Court erred in holding and deciding that the complainant by his bill makes a case which entitles him in a Court of Equity to relief against the defendants, or either of them, touching the matters contained in the said bill.

I respectfully submit that:

1.—Local assessments are made in the exercise of the powers of taxation vested in the legislative department of the government. Everything necessary to this end is included in its power and jurisdiction; the power to determine if the improvement is necessary;

whether it is of a general or a local benefit; if local, what property is within the local territory benefited and what part of the benefit each parcel of this territory would derive.

2.—These are all questions of fact involving the exercise of judgment and discretion by the legislature. The only limitations and restrictions being those prescribed in the constitution of the United States and the State of New York. The Legislature, if it chooses, may delegate a part of this power to the appropriate local officials, but the legislature may itself conduct the entire proceeding.

3.—The power of the courts is limited to ascertaining if the legislature complies with the constitution and if the local bodies in exercising the powers delegated to them, keep within the constitution and the law by which the legislature gives the matter to them.

4.—When the legislature has kept within the constitution, and the local body has kept within the constitution and the statute, the court will not interfere by suit in equity merely because it may appear that either the legislature or the local body has used bad judgment in the decision of a question of fact, or in the exercise of its discretion. The courts recognize that any scheme dependent on human agencies for its execution may necessarily operate defectively at times; that absolute justice and accuracy can not be obtained in exercising the powers of taxation, and will not interfere in equity except where it appears that the lines drawn by the constitution to govern the action have been transcended.

5.—A Court of Equity will not interfere simply to enforce a technical right or an abstract rule of law. The plaintiff must show some wrong or injury. The mere fact that the assessment was apportioned by the foot front in this case, without any allegation that it caused the plaintiff to pay any more than a sum equal to the benefits which he derived from the improvement, states no cause of action.

6.—The front foot rule of apportionment is not necessarily a wrong rule; it may be adopted if in the judgment of the assessing body the benefits were derived in that proportion.

7.—If it appeared in this case that the legislature made inquiry and decided that the benefits were conferred upon each parcel in proportion to its relative frontage, the assessment could not be assailed simply because the frontage rule was used as a detail of the process of distributing and deciding the benefits.

In the absence of any evidence, whether or not the legislature made such prior decision, if such prior decision was necessary to the validity of the assessment, this court will presume that it was made, because all judicial intendments and presumptions are in favor of the regularity and validity of official proceedings.

**The Trial Court erred in holding that the mere fact that so much of the amount asssessed upon each parcel was in the same ratio to the entire amount assessed, as the amount of frontage of the parcel on the improvement was to the entire frontage on the improvement, was sufficient evidence that the assessment was not based upon the amount of benefit derived from the improvement by each lot; thus reversing the presumption that the official acts of the legislature and of municipal boards result from correct procedure.**

It should be borne in mind that the claim that the assessment is void rests solely upon the allegation that the legislature erroneously directed apportionment according to the frontage, and that no discretion on the subject was vested in the local board, "and that *thereby* and unless the sale thereof be enjoined" the plaintiff's lands will taken without due process of law. (*Fol.* 13, *pp.* 7 & 8.)

There is no allegation of any error or irregularity by the local authorities. Therefore, the single question presented is whether merely because the legislature ordered that the expense be assessed so much upon each lot as was in proportion to its frontage, is the statute unconstitutional and void.

The same question was presented to this Court in *Parsons vs. District of Columbia* (170 U. S., 45), and by the unanious decision of this of this court was answered in the negative.

In that instance Congress had passed an Act directing that assessments levied for laying water mains in the Distrit of Columbia should be at the rate of $1.25 per linear front foot against all lots or land abutting upon the street. The validity of this statute was challenged; the case came to this Court where this objection was disposed of as follows:

"By this legislation a comprehensive system, regulating the "supply of water and the erection and maintenance of reservoirs "and of water mains, was established, and of this legislation "every property owner in the District must be presumed to have "notice. And, accordingly, when by the act of August 11, 1894, "Congress enacted that thereafter assessments levied for laying "water mains in the District of Columbia should be at the rate of "$1.25 per linear front foot against all lots or land abutting upon "the street, road or alley in which a water main shall be laid, such "act must be deemed conclusive alike of the question of the ne"cessity of the work, and *of the benefits as against abutting* "*property*. To open such questions for review by the courts on "the petition of any or every property holder would create end"less confusion. Where the legislature has submitted these ques"tions for inquiry to a commission, or to official persons to be "appointed under municipal ordinances or regulations, the in"quiry becomes in its nature, judicial in such a sense that the

"property owner is entitled to a hearing, or to notice or an op-
"portunity to be heard."

*Parsons vs. District of Columbia*, 170 U. S., 45.

The Court of Appeals of the State of New York many years ago held the same way. In the opinion from which the following extract is taken there is an examination of the authorities upon the subject, after which the opinion continues:

"The settled principles to be deduced from these cases are, "that the sovereign power of taxation is lodged in the legisla-
"ture; that the power of taxing and the *power of apportioning* "*taxation* are identical and inseparable; that there is no consti-
"tutional restraint upon the exercise of this power; that the "right of determining *what portion* of the public burdens, by "way of taxation, *shall be borne by any individual* or class of "individuals, must be determined by the legislature; that how-
"ever much this power may be abused by the legislature, the only "check upon it is the responsibility of the legislative body to its "constituents."

*People ex rel. Crowell et al. v. Lawrence et al.* 41 N. Y., *p.* 141.

A local assessment had been adjudged void. The legislature thereupon passed an Act re-assessing the expense. The effect of the Act is stated by the Court of Appeals of New York as follows:

"The act then provides that two-thirds of the cost and ex-
"penses of such improvements is made a lien and assessment "upon the land and premises included in the respective districts of "assessments, 'and two-thirds and no more of each of said several "assessments * * * is *hereby levied* on the several pieces of land "and premises within said several and respective districts, *and in* "*the same proportions in which the same has been already as-*
"*sessed and apportioned therein as aforesaid, levied as a tax* to "be collected and applied by said city; and also provides that "one-third of such expenses shall be a general charge upon the "city.' There are other provisions which it is unnecessary to "notice."

It will be seen that the statute fixed the proportions in which the expense of the improvement should be assessed upon the different parcels of land by reference to the former assessment.

The Court held that the legislature had the capacity to exercise this power, the following being the language of the Court:

"The legislature, in effect, has declared that the petitioner "shall pay a specified sum upon his property, described, toward "defraying the expenses of repaving St. Felix street, adjacent "to which his property is located; and it has imposed a like bur-
"den upon property similarly situated. It was conceded, on the "argument, that the legislature might have authorized a reas-
"sessment. If so, it is clear that it could make the reassessment "itself; and this is precisely what it did by the act of 1872. What-
"ever the legislature may authorize to be done by a municipal

"corporation, it may do itself directly; and it is no objection "that the improvement had been made and expenses incurred. "(37 N. Y., 267)."

*Matter of Application of Van Antwerp, Jr., et al Executors, etc., to Vacate Assessment*, 56 N. Y., 261.

The *Van Antwerp* case is quoted with approval by this Court in *Spencer vs. Merchant* (125 U. S., 353).

It is respectfully submitted that the following allegations of the answer filled in this case are sustained by the above decisions:

"They allege and aver upon their information and belief that "that rule of apportionment was adopted and authorized by the "legislature of the State of New York with reference to, after in- "quiry into, and upon consideration and determination of the "benefits which the improvement authorized and made conferred "upon the said lands, which inquiry, consideration, and deter- "mination appears by the statutes aforesaid and by each of them, "and that the legislature of the State of New York, under the con- "stitution of that State, as frequently interpreted by its highest "courts, had and now has the power and capacity to prescribe "such rule for apportioning expense of local improvement as will "in its judgment best result in apportioning to each parcel of land "assessed that part of the expense which shall be in proportion "to the benefit conferred by the improvement.

"And further allege and aver that said determination made "by the legislature and evidenced by the said statutes and by each "of them bars and precludes the complainant from asserting or "claiming that said assessment is not made upon the complain- "ant's lands in proportion to the benefits which they derived by "the making of said improvement; and they crave leave to sub- "mit the said statutes and each and every part of them to this "honorable court, that the same may be properly construed in "that regard." (*Fol. 47*).

It has been held by the highest courts of New York that where the legislature delegated to municipal officers the power to apportion the expense of improvement upon parcels of land according to the benefit to each, that the mere fact that it was apportioned according to the frontages did not prove that the amount was not levied in proportion to benefits derived from the improvement.

"The value, the superficial area or the frontage of property "benefited by a local improvement may be adopted as a basis or "method of calculating and ascertaining what part of the cost of "such improvement should be levied upon the several pieces of "property, but neither method will satisfy the requirements of "the statute unless the amount so *levied is in proportion to the "benefits.*" * * * *The presumption of law*, however, is that "the board of assessors proceeded according to law, and that the "assessment was levied according to law, and that the assess- "ment was levied in a fair, just and equitable manner."

D. & H. Canal Co. v. City of Buffalo, 39 App. Div. 346.

In another case, plaintiff objected to the assessment "that it "was apportioned among the owners of the lots fronting upon "the avenue in proportion to the frontage of each lot upon the "street, some of the lots being vacant and others occupied by "valuable buildings."

O'Reilly vs. City of Kingston, 144 N. Y., 447.

There was no evidence in the case, so far as the opinion discloses, of any formal determination by the assessors as to the proportion of benefits, except such as the method of computation and apportionment, which the assessors had adopted, afforded. Of this, Judge Haight, writing the opinion of the court. Court of Appeals of New York, said:

"That the assessors had an opportunity to examine the "premises personally, and were thus possessed of information "which cannot be brought before a court on review, consequently "their judgment upon the question, as to the amount of benefit "derived, cannot be here reviewed, unless they acted upon an "erroneous principle in making the assessment. It appears that "they reached the conclusion that the tax should be apportioned "among the owners of the real estate bordering upon the street "according to the number of feet front owned by each individual. "*This is not necessarily an erroneous principle*, if it was their judg- "ment that each owner *was benefited in that proportion*. On "the other hand, it may be the most just and equitable of any "that could be adopted." (Page 448.)

*These decisions defining the power of the legislature and sustaining the method of assessment affect property rights and values. They have been so long recognized in our state that to change them now would disturb titles, change values and disappoint the expectations of those who acted in reliance upon them.* And,

"Since the ordinary administration of the law is carried on by "the State courts it necessarily happens that by the course of "their decisions certain rules are established which become rules "of property and action in the State, *and have all the effect of "law, and which it would be wrong to disturb.* This is espec- "ially true with regard to the law of real estate, and the con- "struction of State constitutions and statutes. Such established "rules are always regarded by the Federal courts, no less than by "the State courts themselves, as authoritative declarations of what the law is."

Burges v. Seligman, 107 U. S. 20.

If the statute recited, or if it otherwise appeared affirmatively, that the legislature, by a special committee or otherwise, examined the premises and concluded that each parcel of land fronting upon the street was benefited by the improvement in an amount which bore the same ratio to the entire amount that its frontage bore to the entire frontage and prescribed this rule of

apportionment based on this prior decision, there could be no doubt as to the validity of the assessment.

There is no evidence in this case showing whether or not this was done.

If such prior investigation and decision was necessary we are left by the allegations of the bill to conjecture or presumption as to whether such prior action was or was not taken.

If such prior decision was necessary the Court will not presume that it was not taken but will presume that it was taken.

Because "the general rule is, that acts with purport to have "been done by public officers, in their official capacity, and with- "in the scope of their duty, will be presumed to have been regular "and in accordance with their authority, until the contrary appears."

Abb. Nat. Dig., vol. 2, title Evidence, § 63 (citing cases).

"Every presumption is in favor of the validity of the assessment."

In re Brady, 85 N. Y. 268.

"In an action to restrain the sale of land for nonpayment of an "assessment for a local improvement and to set aside the assessment because of alleged invalidity in the proceedings, *the burden "is upon the plaintiff to establish the invalidity complained of.* "There is no presumption in such an action that municipal aut- "horities have acted illegally or that conditions procedent have "not been performed."

Tingue vs. Village of Port Chester, 101 N. Y. 294.

"Acts done by a corporation, which presuppose the existence "of other acts to make them legally operative, are presumptive "proofs of the lather." (citing cases).

Demings vs. Supreme Lodge, 131 N. Y., 527.

":In the absence of proof to the contrary it will be presumed "that public officers are in the rightful performance of duty."

Valley Township vs. King I. B. Mfg. Co. (Ct. of App. of Kan.), 45 Pac. Rep. 660.

In a similar case to ours the Supreme Court of New Jersey held:

"There is no evidence that in laying the benefits, so far as "there were benefits, upon the frontage, the commissioners did not "conform to the principle of peculiar benefits. The principle of "frontage assessment is not necessarily wrong. If that mode "properly distributes the benefits among the owners of the pro- "perty benefited, there can be no objection to its use."

Raymond's Estate v. Mayor, etc., 27 Atl. Rep. 175.

"Acts done which presuppose the existence of other acts to "make them legally operative are presumptive proof of the "latter."

Scovern v. State of Ohio, 6 Ohio St. 293.

If it be true that the validity of a frontage assessment depends upon a prior determination that the lands were benefited on that

basis the fact that the assessments were made on that basis it presumptive evidence that the determination preceded it.

"All acts done by what appears to be public authority are "presumed to be rightly done, until the contrary is proved."

Commonwealth v. Kane, 108 Mass. 425.

Citing U. S. v. Dandridge, 12 Wheat, 69, 70.

Where the validity of a judgment was involved our own Court of Appeals held:

"But, we think, the principle applies, stated by Story, J., in "The Bank of the U. S. v. Dandridge, 12 Wheat 79, that acts done "by a corporation, which presuppose the existence of other acts "to make them legally operative, are presumptive proofs of the "latter, and that upon this principle it must be presumed, in the "absence of evidence, that the company complied with the act."

Pringle v. Woolworth, 90 N. Y. 510.

"Neither is it essential that the act of the legislature, or an "ordinance made under its authority, should *expressly state that "the contemplated improvement is necessary* (Roads & Streets, "385), nor is it required the act should *expressly declare that "the assessments are made according to the benefits conferred.* "Both of these are implied from the very nature of this species of "taxation, and that this is so is apparent from the action of the "court in upholding such assessments under acts which make no "reference to such particulars."

Raleigh v. Peace, 110 N. C. (Sup. Ct.) 40-41.

When an official body were required to vote on a proposition by ayes and noes and the evidence did not disclose how the votes were taken the court presumed that they were taken by ayes and noes.

In re Board of Rapid Transit (N. Y. First Dept., Gen. Term), 18 N. Y. Sup. 320.

When an act might lawfully have been done by a public body before a given date, and if done subsequently the act would have been without authority, in the absence of evidence the court presumed that the act was in proper time.

State vs. Hannibal, etc. (Sup. Ct. of Mo.), 21 S. W. Rep. 14.

"In the absence of evidence to the contrary it must be pre- "sumed that the cost of reconstructing a sidewalk was appor- "tioned in accordance with the law."

Anderson vs. Bitzer, (Ct. of App. of Ky.), 49 S. W. Rep. 442.

"The court applies the maxim *omnia rite acta*, and assumes "(in the absence of evidence to the contrary) that municipal "authorities have proceeded in accordance with law in imposing "special taxes for a street improvement."

Asphalt Paving Co. vs. Ullman (Sup. Ct. of Mo.), 137 Mo. 544.

"Since the directors are forbidden to employ a teacher not

"legally qualified, in the absence of anything appearing to the "contrary, the courts will indulge in the presumption that the "directors did their duty and that the teacher was legally "qualified."

McShane vs. School Dist., 70 Mo. App. 624.

"We must presume, therefore, until the contrary is shown, "that their action was lawful. It cannot be presumed, as said in "Cummins vs. City of Seymour, 79 Ind. 491, 'that the corporate "officers will violate the law and perpetrate a wrong. The pre-"sumption is the reverse. Until the contrary appears, the "officers of a public corporation are presumed to have done their "duty.'"

Town of Woodruff Place vs. Raschig, 147 Ind. 521.

"We have heretofore referred to the presumption that public "officers do their duty while acting officially; that is, the pre-"sumption operates in favor of the regularity and validity of "official acts." * * * "They are not presumed to disregard "the law or to exercise their power and authority in opposition "to it, to act officially and and in a different mode from that pre-"scribed."

Gillett-Herzog Mfg. Co. vs. Board of Commissioners (Sup. Ct. of Minn.), 72 N. W. Rep. 126.

"When the act upon which his right to maintain an action "depends is an official act, to be performed by a public officer in "the line of his official duty, there is no presumption that any "delay in this performance was unreasonable."

47 Pac. Rep. 879 (Sup. Ct. of Cal.)

In construing statutes which are susceptible of two constructions, the rule announced by the Supreme Court of the United States is:

"Our duty, therefore, is to adopt that construction which, "without doing voilence to the fair meaning of the words used, "brings the statute into harmony with the provisions of the "Constitution."

Grenada Co. vs. Brown, 112 U. S. 261.

It is only when public action is on its face illegal and not susceptible of being regarded as properly taken that the courts will pronounce it illegal.

Soon Hing vs. Crowley, 113 U. S. 703.

The two rules for which I contend, I respectfully submit, are sustained by an abundance of authority uninterrupted for many years, and recognized and applied in the courts of the United States and in nearly all the States, viz.:

(1) *That by the foot front may be adopted by public bodies in apportioning assessments, providing they believe this method accords with the benefits.*

(2) *That in the absence of evidence to the contrary, it will be presumed to have been properly adopted.*

In *Norwood vs Baker*, so much relied upon by the plaintiff,

and on the authority of which this case was decided in the court below, *it appeared on the face of the proceedings* that the officers had not acted within the scope of their powers under the constitution; their power to make local assessments was limited to cases in which the improvement had conferred local benefits, and to the just apportionment of the burden in accordance with the benefits in that locality.

The *record showed* that all consideration of benefits was deliberately excluded; that the local body by affirmative action had decided to lay all considerations of benefits aside and to assess the expense arbitrarily without regard of benefits.

The Ohio statute, section 2264, authorized the local council to assess the expense of a local improvement:

"On the abutting and such adjacent and contiguous or other "other benefited lots and lands in the corporation *either* in pro- "portion to the benefits which may result from the improvement, "*or* according to the value of the property assessed, or by the front foot of the bounding and abutting the improvement."

Concerning this statute, the Supreme Court of Ohio, in City of *Cincinnati vs Batsche*, 40 N. E. Rep., 23, spoke of the "frontage plan" as "one of the methods of assessment designated in the Revised Statutes," and again the methods are referred to in this case as "three statutory 'modes' of apportioning by special assessment the costs and expenses of the improvement upon the lots of land."

The court then gives the history of the development of these different "modes" in the statutes of Ohio and concludes:

"A plan of assessment in proportion to resulting benefits, dis- "tinct from that according to valuations and that by the foot "front, is therefore, provided by statute, which is not limited to "lots and lands bounding and abutting upon the improvement, "but may be extended to lots and lands contiguous and adjacent, "though situated on streets other than that of the improvement."

In that case the court holds that where the council elects to proceed under one of these distinct plans of "assessment" the proceedings must be conducted in conformity to it and cannot be conducted in a mixed method comprising features of the different plans.

So, that under the construction which the highest court in the State of Ohio had placed upon this statute and, indeed, according to its obvious meaning, the adoption of the foot-front mode of apportionment necessarily excluded the methods of apportionment on the basis of benefits and on the basis of valuation. The case was precisely as if the legislature of Ohio had passed a statute which directed the local council to exclude all considerations of benefit and all consideration of the valuations of the different parcels, and to apportion the expense on the basis of frontages, without reference to any other consideration whatever.

Had the legislature simply passed an act directing that the apportionment be made by the foot front, or in the method prescribed by our statute of 1893, this Court would have undoubtedly upheld it because it would have held, as it frequently has, that the enactment of the statute in that form by the legislature was a determination that these lots and parcels of land would be benefited in proportion to their relative frontage upon the improvement. See cases cited in the opinion of Mr. Justice Brewer, 172 U. S., 297.

There was no opportunity to indulge in presumptions that the proceedings were properly conducted, because it affirmatively appeared that they had not been; that the only theory on which under the constitution, the expense of a public improvement could be assessed locally, had been sit aside.

A brief reference to the prevailing opinion in *Norwood* case will sustain the above statement.

This court, in the prevailing opinion (172 U. S., at *p.* 281), quotes with approval from a Missouri case as follows, viz:

"The whole theory of local taxation or assessment is that "the improvements for which they are levied afford a remunera-"tion in the way of benefits. A law which would attempt to "make one person, or a given number of persons, under the guise "of local assessments, pay a general revenue for the public at "large, would not be an exercise of the taxing power, but an act "of confiscation."

At pages 289 and 290 the prevailing opinion recites the provisions of the statues under which the improvement was made, and adds:

"*It thus appears* that the statute authorizes a special assess-"ment upon abounding and abutting property by the front foot "for the entire cost and expense of the improvements *without tak-"ing special benefits into account.* And that was the method "pursued by the village of Norwood."

This is a much different decision from the decision which was made by the trial court in our case.

In the Norwood case the proceedings bore evidence on their face, "it *thus appeared,*" that all consideration of benefits was excluded and the expense arbitrarily apportioned according to frontage.

In our case there is no evidence on the face of the proceedings; there is no allegation in the complaint; there is no proof before the court of any kind that the assessment was not apportioned according to benefits. The plaintiff and the court below *infer* that the mere fact that the apportionment was made by the foot front, affords evidence that all consideration of benefits were excluded.

I respectfully submit that the plaintiff and the lower court are in error. That in the words of Justice McLennan, in giving the opinion of the Appellate Division of the Supreme Court of the State of New York, "the frontage of property benefitted by local

"improvement may be adopted as a basis or method of calcula-
"ing, and ascertaining what part of the cost of such improve-
"ment should be levied upon the several pieces of property,"
*providing* the amount so levied is in proportion to the benefits and that in the absence of evidence to the contrary "*the presump-*
"*tion of law*, however, is that the board of assessors proceeded
"according to law," and that the assessment was levied in proportion to the benefits.

*Delaware & Hudson Canal Co. vs. Buffalo*, 39 App. Div., 346.

Or in the language in which the judgment of the Court of Appeals is expressed by Mr. Judge Haight that the apportionment by the foot front "is not necessarily an erroneous principle,
"if it was there" (assessors or legislators) "judgment that each
"owner was benefited in that proportion."

*O'Reilley vs. City of Kingston*, 114 N. Y., p. 448.

Or as was said by the Supreme Court in New Jersey, "there is
"no evidence that in laying the benefits so far as there were bene-
"fits, upon the frontage, the commissioners did not conform to
"the principle of peculiar benefits. *The principle of frontage*
"*assessment is not necessarily wrong.* If that mode properly
"distributes the benefits among the owners of the property bene-
"fited, there can be no objection to its use."

*Redmonds estate vs. Mayor, etc.*, 27 Atl. Rep. 175, and see the numerous authorities on this subject hereinbefore cited.

As I have already endeavored to show, the allegations of the bill, that the parcels "were not benefitted equally by the making of said improvement * * * that many of said lots and parcels are unequal in size and depth and of unequal value" (folio 13) does not show facts from which it may be inferred that a frontage assessment did not distribute the burthen according to the benefit since size and value are measured by frontage, and depth beyond a short distance from the street would not be benefited by the improvement.

*It can not be claimed in this case that the statute is void because there was no notice to the property owners* ~~*or board*~~ and opportunity *to be heard before the rule for apportioning the benefits on the several parcels of land was adopted by the legislature.*

It is not necessary that every property owner to be affected by a tax statute have notice and opportunity to be heard before the legislature establishes a rule of apportionment. It is sufficient if at any stage of the proceeding he have notice and an opportunity to object.

*Spencer vs. Merchant*, 100 N. Y., 585.

*Spencer vs. Merchant*, 125 U. S., 345.

The original statute (Chap. 550, Laws of 1893) which authorized this work to be done, directed that the expense be apportioned in the manner in which it was apportioned under the subsequent statute, (Chap. 816, Laws of 1895), so that from

the very first the property owners knew it was contemplated to make the improvement at the expense of the lots or parcels of land fronting upon the improvement, and to be distributed according to the relative frontages of these parcels. And the first section of the Act of 1893 directed the Town Board to make a preliminary order describing the contemplated improvement, estimating the expense to be levied, and directed that "a copy of "said order shall be published once a week for two weeks in a "newspaper printed in the Village of Tonawanda. Said order "shall also contain a notice notifying all persons interested in "said improvement to appear before said board at a time and "place to be specified therein, which shall not be less than ten "days after the first publication thereof, to make such objections "as they may have *to such improvement*, which order and notices "in addition to being published as aforesaid, shall be posted con-"spicuously in at least three public places in said town, not less "than ten day prior to the date to be specified therein for the "hearing of objections as aforesaid. The said order and notice "shall be signed by the chairman of the town board of said town.

"§2. At the time and place to be specified in the notice "mentioned in the last preceding section, or at such time and "place as the said town board shall adjourn to from time to time, "it shall give all persons appearing to object *to said improve-"ment*, or to be heard in reference thereto, a reasonable hearing "and thereupon may reverse, affirm or modify the said order as "the said board may deem proper.,,

If the scheme of apportionment outlined in the statute would operate unjustly or inequitably this objection could have been urged to the board against the improvement; if it was violative of the constitution and would operate to distribute the burden of the improvement in amounts in excess of the benefits to the respective parcels, this objection could have been urged to the board; and if the objection was meritorious, and if the board should err in judgment and determine to make the improvement pursuant to the scheme outlined in the statute when it was inequitable or unjust to do so, under the laws of procedure of the State of New York (Chap. 16, Title 2, Art. 7., Code of Civil Pro.), the matter could have been taken to the Supreme Court by certiorari.

The first section of this article reads as follows:

"Section 2120. Cases where writ may issue. The writ of "certiarari regulated in this article, except the writ specified in "section 2124 of this act, is issued to review the determination "of a body or officer. It can be issued in one of the following "cases only." * * *

"2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ or the power of the court to issue it is not expressly taken away by statute."

Section 2124 above referred to has reference to the use of the writ from one court to another.

That this remedy is available in a case of this kind has been decided by the highest court of the State of New York.

Kennedy vs. City of Troy, 77 N. Y., 493.

People ex rel Spencer vs. New Rochelle, 83 Hun, 185.

The subsequent statpte under which the assessment was made (Chapter 816, Laws of 1895, Section 44) provided for notice when the assessment-roll should be completed, of a time and place when "the board shall meet and hear and consider "any objections to the assessment-roll, and may change or "amend the same if they deem it necessary or just to do so, and "may affirm and adopt the same as originally proposed, or as "amended or changed, or they may annul the same and order the "engineer and surveyor to proceed anew and prepare another "list."

And further provided that if it should be annulled and new list made, like notice and hearing should be given and like power for its review. And section 46 of the statute provided:

That "any person interested who shall have appeared before "the board and made his objections at any hearing provided for "in this statute, and who shall consider himself aggrieved by the "action of the board, may, within twenty days thereafter, have "a writ of certiorari for a review of the decision or action of the "board from the Supreme Court, pursuant to the general pro-"cedure in that court."

And the court was given power to review or revise or annul the action of the board.

It will be seen that at the inception of the proceedings and during their progress the rights of the parties interested to a hearing and redress of grievances was carefully guarded.

Should it be held that a statute which arbitrarily fixes the rule by which a public burden shall be apportioned without giving the taxpayer an opportunity to be heard, and to show that he will not be benefited, in accordance to this rule, by the public expenditure, is unconstitutional and void, it would unsettle titles and rights on which the public have reposed since the foundations of our government.

If there must be this notice, hearing and determination as to benefits in each instance of local taxation, there must be the same as to general taxation, because, as the law is in New York, *all taxes are imposed on the same theory, viz.: that the purposes for which they are to be applied will afford equivalent compensition in benefit to the person who pays them.*

"Money is property. Taxation takes it for public use; and "the taxpayer receives, or is supposed to receive his just compen-"sation in the protection which government affords to his life, "liberty and property, and in the increase of the value of his pos-"sessions by the use to which the government applies the money

"raised by the tax." * * * "*The difference between general taxa-*
"*tion and special assessments for local objects, requires that they*
"*should be distinguished by different names, although both de-*
"*rive their authority from the taxing power.*"

The People vs. Mayor, etc., of Brooklyn, 4 N. Y., 419.

If the owner must in every instance be given notice and a and a hearing, and there must be a decision whether the amount of his tax is in proportion to his benefit, there can be no general rule of apportionment. There *must be a special decision in each case*, and if the legislature may not make the decision, where does the power to decide that the assessment is greater than the benefits reside? Must the courts decide that question in every instance? If so, every tax will be laid with uncertainty because no one will know whether the courts will concur in the judgment of the legislature that a public work will improve a specified territory only, and that this territory only should be taxed for it, or that it benefits each parcel of land within this territory in proportion to its superficial area, or to its value, or to its relation to the improvement, or in any other proportion which the legislature may believe to be just and prescribe. In other words, is every conclusion of fact which it may become necessary for the legislature to form in prescribing a scheme of taxation, or of local improvement, to be reviewed by the courts?

Must there be a judgment in the case of each individual as to how much the proposed tax will benefit him? If it be a tax to maintain the National Guard, will the citizens of cities and centers of industries where outbreaks are most liable to occur, be benefited more than the isolated farmers? And if the legislature prescribes a uniform rate of taxation, based on the value of their property respectively, will the courts set the legislation aside as contrary to the Constitution, upon the ground that it will be unjust to assess them arbitrarily in proportion to the valuation of their property, witout giving them an opportunity to be heard before a tax is apportioned, on the basis of valuation, before some tribunal having capacity to decide how much each will be benefited by the maintenance of the National Guard, and how much of the burden of its expense each must bear?

If it be a tax to defray the expense of administering justice, should not those who are so unfortunate as to have lawsuits pay more than those who do not? Is the benefit to each by the administration of justice the same, and is not the statute apportioning this expense arbitrarily and in proportion to the valuation of the property of each, without regard to the benefits, and without providing for a hearing before some body which shall have power to say how much each will be benefited by the administration of justice, and to adjust the amount that each will pay in proportion to such benefit, unconstitutional?

This will be the logical result of giving the *Village of Norwood* case the effect which our opponents contend for, and it would

lead to great uncertainty and confusion because, as in this case, the court might not be called upon to act in each case until long after improvements have been made, taxation laid and obligations assumed and parties have expended their money and their toil on the faith of the statute.

I don't believe that the case of the *Village of Norwood* goes to that extent. It justifies no such claim. It merely decides what has always been the law, that where a statute *on its face* clearly contravenes the provisions of the Constitution, it is the province of the courts to declare it invalid and refuse to carry it into effect. But when the legislature has acted on a subject that is within its jurisdiction and in a way which on any construction of its action it may be found consistent with its authority, such construction will be given it, and that all presumptions are in favor of its validity.

I respectfully submit that this Court has not decided that a statute directing that taxes be paid on the basis of the value of one's property, of the amount of one's income, or the amount of the output of a distillery, and so on, leaving only the question of value or amount to be settled on a hearing, are unconstitutional and void. If the legislature may decide that one is benefited by the improvement of all the highways in the town in proportion to the value of his property without notice to him, may it not, also, decide that one is benefited by the improvement of one of these highways in proportion to the frontage of his land upon it without such notice?

The Legislature being vested with all the power necessary to enable it to make a valid assessment, and there being no allegation in the complaint that the property of the plaintiff was not benefitted by the improvement or that the amount apportioned to his property was in excess of the amount of his benefits, or that he was in any manner dealt unjustly by, Equity will not set the proceedings aside simply because the assessment was made by the frontage, even if technically this was improper. Equity looks to the effect rather than to the form.

To use the language of Mr. Justice Brown in giving the judgement of this court. "A court of Equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice."

Foster vs. Mansfield, 146 U. S., 88.

"Until *injury* is shown, the error is technical and not substantial."

In re Petition of Mutual Life Ins Co., 89 N. Y., 530.

Bell vs. City of Yonkers, 78 Hun, 202.

"The objection by a lot owner that a method of apportion-
"ment of assessment was adopted on the erroneous assumption
"that the property was divided into squares by principal streets
"cannot be sustained where it does not appear that he would
"have had to pay less if a different method had been adopted."

McHenry vs. Selvage (Ct. of App. of Ky.), 35 S. W. Rep., 615.

"This court is not the hardor in which people of a city or "county can find a refuge from ill-advised, unequal, and oppres- "sive State legislation."

Walston vs. Nevin, 128 U. S. 578.

See, also, Hoffeld vs. Buffalo 130 N. Y. 387.

It will not do to set aside the proceedings of a public body which in its results works justly, simply because it has not been taken in literal compliance with law.

Even at law "it would be contrary to the general rule to re- "verse a judgment for a technical error which did not affect the "result."

Matter of Bernsee, 141 N. Y. 394.

Not only is there no allegation that the plaintiff was injured by the alleged error but there is good authority for contending that the method is equitable.

The following from one of JUDGE SHARSWOOD'S opinions is also quoted with approval by the Supreme Court of North Carolina:

"Perhaps no fairer rule can be adopted than the proportion "of feet front, although there must be some inequalities of the "lots differing in situation and depth. Appraising their market "values and fixing the proportions according to these, is a *plan* "*open to favoritism or corruption, and other objections.*"

The following, from Elliott on Roads and Streets (page 396), is also quoted with approval:

"The system which leads to the least mischievious and unjust "consequences is that which takes into account the entire line of "the way improved and apportions the expense according to the "frontage, for it takes into consideration the benefit to each "property-owner that accrues from the improvement of the entire "line of the way and does not impose upon one lot owner an "unjust portion of the burden."

Raleigh v. Peace, 110 N. C. 42, 43.

The Supreme Court of Delaware fully recognizing the principle laid down in the *Norwood* case that it is only the special benefits actually or presumptively received from the improvement which justifies the local assessment says:

"When the legislature adopts the latter method (*i. e.*, the "measurement of length, quantity or value), *it decides itself the* "*proportion in which the estates respectively will be benefited;* "as when it determines that the frontage or area of abutting lots, "or both combined, shall constitute the measure of a sewer as- "sessment. If the legislature has exercised its power *bona fide* it "must necessarily have considered all the circumstances surround- "the particular case and have decided that all things considered "such a measure would prove as nearly just and equal in its "actual operation as any practicable method could be."

In considering an objection to the foot-front rule of apportionment where, as it is claimed in this case, some of the lots were deeper than others, the Supreme Court of Connecticut overruled the objection as follows:

"When we consider that here is land that would be benefited "to an amount of more than $3,600 by the laying out of this "street, should the annexation be made, and the land adjoining "would likewise be benefited to a large amount under like circum- "stances, and that no benefit would be conferred upon either "tract so long as they remained the property of different propri- "etors, is it reasonable to suppose that there can be any serious "obstacle to prevent the one owner from selling and the other "from buying, when so great an advantage would result to both "from such sale and purchase? A consideration of this character "no doubt had its proper effect in the determination of the question "whether the land was benefited or not, and the extent of that "benefit."

Terry v. Hartford, 39, Conn. 286.

In conclusion it is respectfully submitted that the decree appealed from should be reversed with costs to the appellants in this court and the cause remanded with directions to dismiss the suit with costs in the court below.

JOHN CUNNEEN,

Solicitor and of counsel for appellants,

85 W. Eagle St.,

Buffalo, N. Y.

No. 214.

Reply Brf. of Cunneen for Apps.

FILED
MAR 8 1901
JAMES H. MCKENNEY

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IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

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NO. 214.

THE TOWN OF TONAWANDA, NEW YORK, AND JOHN K. PATTON, SUPERVISOR OF SAID TOWN, *Appellants,*

*vs.*

JAMES B. LYON.

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## BRIEF IN REPLY.

---

JOHN CUNNEEN,
Solicitor and of Counsel for Appellants,
85 West Eagle Street,
Buffalo, N. Y.

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---

## BRIEF IN REPLY.

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In view of the patient and considerate hearing which the Court accorded me in this case, I tender a word of explanation and apology for availing myself of the opportunity so kindly extended by the Court at the close of Mr. Becker's argument, to file a reply.

I.

The following allegations in the brief of counsel for the appellee filed herein have no support whatever in the record; they are purely voluntary statements on his part.

The statement on page 3 that "owing to the fact that this assessment was so plainly void because the law was unconstitutional, no serious attempt was ever made to enforce it, and only a small amount was paid upon it."

* * * "In fact the assessment was abandoned soon after it was levied," is contrary to the record, wherein it is alleged (Fol. 35) that when the assessment list under the Act of 1893 became final, it was "delivered to

> "the Supervisor of the Town of Tonawanda,
> "William J. Rogers, who was the predecessor of
> "the defendant Patton, as supervisor of said
> "town; that the said supervisor proceeded to
> "collect said assessments and to apply the same
> "in payment of principal and interest as the
> "same became due, pursuant to the provisions
> "of said bonds, and *did threaten to advertise*
> "*and sell such lands*, so assessed as aforesaid, as
> "should be necessary to raise the moneys neces-
> "sary to pay said bonds, and that the supervi-
> "sor of said town for the time being continued
> "to make collections of the installments of said
> "assessments until on or about the 29th day of
> "May, 1895, when Chapter 816 of the Laws of
> "the State of New York of 1895 was approved
> "by the Governor and became of force, and that
> "thereupon the town board of the Town of
> "Tonawanda proceeded to reassess the moneys
> "necessary to pay said bonds as aforesaid, pur-
> "suant to the direction contained in section 27
> "of the statute last mentioned."
>
> (See also folios 37-38).

Neither has the following statement in counsel's brief any support in the record, viz:

That section 27 was "smuggled into the middle of the act," (of 1895) "by appellant's counsel."

If counsel deemed it important to have it adjudged whether this section was smuggled into the statute or not, he should have presented the subject in his bill; if he did not deem it of sufficient importance to present it by his bill when issue could have been properly taken upon it he should not have made a voluntary statement on the subject in his brief. I object to these outside matters being considered but if they are to be let me say that section 27 was not "smuggled" in. It was deemed necessary because the Act of 1893 contained no provision for the future care of this road and the ordinary methods were not supposed to be adequate, also because errors had been committed in making the first assessment which it was desired to correct.

Again, at page 5 of his brief, he states that the "lots varied greatly in depth, *situation* and value."

The word "situation" is used for the first time in counsel's brief; it will not be found in the record.

The following statement at the foot of page 10 of counsel's brief is not sustained by the record nor by the facts, viz:

> "The appellants have sought and obtained from "the State Legislature, since the decree appealed "from was entered, ample authority to make a "new assessment for the expenses of this im- "provement after 'proper inquiry' and ascer- "tainment of the amount of the special benefits "accruing to the several lots. This new act, "drawn by appellant's counsel, amply safeguards "both the appellant town and the owners of the "property to be assessed.

*"Chapter 307 of the Laws of 1900."*

And the same matter is made the subject of a separate point of discussion on pages 25 and 26 of appellee's brief.

I do not know that it is important who obtained the legislation of 1900, or who drew the statute, but the facts are otherwise than as stated in counsel's brief. The legislation was sought and obtained by the property owners along the street because it imposes 20 per cent. of the expense of the improvement upon the property generally in the Town of Tonawanda, whereas the former statute required the property fronting on the street to pay all, and authorizes the Comptroller of the State of New York to exchange over one hundred thousand dollars of the bonds issued on account of this improvement, and now owned by the state, for eighty thousand dollars of new bonds to be issued according to the provisions of this new act. The town was willing to stand on the assessment of 1895, and was very much inclined to oppose the act of 1900.

The statute was drawn by counsel for the property owners and submitted to myself, as attorney for the town, for criticism, and I did criticise it as to its form, but the supervisor of the town, Patton, who was then a member of the Assembly of the State of New York, voted against the bill, and it was a serious question with the town board whether they should not make an active resistance to the enactment of this statute; however, they simply acquiesced, allowing the legislature to pass the act in compliance with the request of the pro-

perty owners hoping thereby to secure peace from litigations.

Now this matter is all extraneous of the record. But if any of the matter is to be considered, let me say further, that the validity of the act of 1900 is already in question.

(1), it is claimed that the title is defective under the constitution of the State of New York in that it is a special act, that it has but one subject suggested in its title, whereas, it has various subjects in its body;

(2), that it attempts to give away public moneys by authorizing the exchange of bonds, and, therefore, was not passed by the requisite vote under the constitution of the State of New York;

(3), that the bonds are in the United States Deposit Fund for Schools, and that the act impairs the obligation of a contract in reference to this fund existing between the United States and the State of New York.

If the decision of the Circuit Court in this case is affirmed by this Court we will have litigations for years to come over the validity of the act of 1900 by these property owners who will thus prevent the sale of their lands in satisfaction of the taxes, while they will be enjoying the benefit of the improvement, as they have done in the past in a litigation which will have its culmination in the decree of this Court to be made in this action, and which has been pending since 1896, and which at one time, as appears by the record, had a large number of cases pending at the same time. While if the decision

of the Circuit Court is reversed, and this Court holds that the statute, which directed the apportioning of this expense by the foot front, was constitutional and valid, there will be no further litigation by the property owners, because they will know that if they succeed in having the act of 1900 declared unconstitutional or void or the assessment illegal or void, we will have the assessment under the act of 1895 declared valid by the highest court in the land, and we will be at liberty to proceed under it, a thing which the property owners will never desire, because it will impose 20 per cent more of the expense upon their property than will the act of 1900.

If the town board, as stated in counsel's brief, are willing to accept the act of 1900 as a compromise of the controversies, and in order to avoid the sale of the lands and further troubles and complications in the matter, then the practical result will be that if the judgment of the United States Circuit Court in this case is reversed the town will accept the provisions of the act of 1900, having, as counsel states in his brief, "now engaged in making this re-assessment," (Last line of Point 2, p. 11), and the property owners will acquiesce in the statute because it will be for their interest to do so to avoid the payment of one-fifth of the expense of the improvement, which under the act of 1900 is imposed on the town at large.

Thus a decision reversing the decision of the Circuit Court will lead to peace and tranquility, while a decision affirming the decree of the Circuit Court will precipitate another flood of litigations.

## II.

A word as to the case added to my brief during the oral argument.

It appears that Commissioners of Public Works of the District of Columbia improved one of its streets. "After the completion of the work, they made "an assessment of one-third of its cost upon the "property adjoining, *proportioning it to the* "*frontage*." (Middle page 688). Subsequently a suit was brought to have this assessment adjudged void. The bill charged, among other things, "3d, that "assessments according to the frontage of the "street were unauthorized and illegal." (Middle "page 689).

It is said by the Court "Congress may legislate with- "in the District, respecting the people and pro- "perty therein, as may the legislature of any "State over any of its subordinate municipali- "ties." (Middle page 690).

Again, "the question is therefore presented, whether "the legislative assembly was empowered by "the organic law of the District to commit "to the Board of Public Works public improve- "ments, to make appropriations for them, and "to prescribe the manner in which assessments "should be made, or whether Congress itself has "confirmed the assessments of which the plain- "tiffs complain." (Foot page 690).

Again: "It may be that the burden laid upon the pro-

"perty of the complainants is onerous. Special "assessments for special road or street improve- "ments very often are oppressive. But that the "legislative power may authorize them, and "may direct them to be made *in proportion to* "*the frontage*, area, or market value of the ad- "joining property, at its discretion, is, under the "decisions, no longer an open question."

*Mattingly vs. District of Columbia*, 97 U. S., 687.

III.

Please let me add to my citations to establish that decisions defining the power of the legislature under the constitution and sustaining the method of assessment of the expense of local improvements made by the highest courts of the State of New York, constitute rules of property and adjudications as to what constitutes due process of law within the state, which it would be wrong to disturb in the Federal Courts.

*Walker vs, Sauvinet*, 92 U. S., 90.

In Conclusion, it is respectfully submitted that the decree appealed from should be reversed with costs to the appellants in this court, and the cause remanded with direction to dismiss the suit with costs in the court below.

JOHN CUNNEEN,
Solicitor and of Counsel for Appellants,
85 West Eagle Street,
Buffalo, N. Y.

No. 214.

Brf. of Becker for Appellee.

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FEB 25 1901
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# BRIEF FOR APPELLEE.

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

Filed Feb. 14 25, 1901.

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THE TOWN OF TONAWANDA, NEW YORK, AND JOHN K. PATTON, SUPERVISOR OF SAID TOWN, APPELLANTS,

vs.

JAMES B. LYON.

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TRACY C. BECKER, BUFFALO, N. Y.,
*Counsel for Appellee.*

EDWARD C. MASON AND RALPH T. KELLOGG, BUFFALO, N. Y., *Counsel for other Land Owners on this Brief.*

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

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THE TOWN OF TONAWANDA, NEW YORK, AND JOHN K. PATTON, SUPERVISOR OF SAID TOWN, APPELLANTS,

*vs.*

JAMES B. LYON.

---

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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BRIEF IN BEHALF OF THE APPELLEE.

*Statement of Facts.*

This action in equity was brought by the appellee, a citizen of the State of New York, to enjoin the collection of an assessment levied by the appellants, citizens of the same State, upon the lands of the appellee for the expense of paving a country highway on which those lands abutted, on the ground that the statute authorizing the assessment was in contravention of the Constitution of the United States, articles V and XIV.

The cause first came before the Circuit Court for decision upon the appellant's demurrer and plea (for which the amended demurrer and plea (Record, pp. 16–25) were afterwards substituted *nunc pro tunc*), and a brief stipulation of facts (Record, pp. 34–35). The court overruled the demurrer and plea with leave to answer. In rendering this decision, the Hon. Alfred C. Coxe, district judge sitting as judge of the Circuit Court, exhaustively and comprehensively examined and considered the questions involved (Record, pp. 35–53).

(Lyon v. Town of Tonawanda, 98 Fed. Rep. 602.) While the appellant afterwards answered (pp. 27–29), the issues were in no wise changed thereby, the allegations contained in the answer being conclusions of law only, hence the final decree appealed from was granted as a matter of course on the grounds stated in the decision overruling the demurrer and plea.

It is our purpose to state these facts very briefly at this point, so that the court may be in possession of the general outline of this case.

Leaving out of consideration allegations in the nature of conclusions of law, the bill of complaint, plea and answer constitue a consistent whole, and are, in effect, as they were intended to be, an agreed statement of the undisputed facts of the case.

The appellee was, at the commencement of this action, the owner in fee simple absolute, of two tracts of vacant land, situated in appellant town, fronting on an old highway, known as Delaware street, a thoroughfare wholly within appellant town, extending through farming lands from the city of Buffalo to the village of Tonawanda, a distance of about three miles. (Bill, pp. 2–3.)

In the year 1893, the town of Tonawanda paved this highway with vitrified brick on a cement foundation, from end to end, and forty feet wide, at the enormous expense of $232,000 and more.

The appellant town had no authority for making this improvement or incurring this expense, except that conferred by a special or local act of the Legislature of the State of New York, known as chapter 550 of the Laws of 1893. This statute was expressly limited in its application to this Delaware street and a few other parallel highways connecting Buffalo and Tonawanda village, and, it may be stated, to explain what follows, this statute of 1893 was clearly in contravention of the Constitution of the State of New York, which forbids the enactment of a local act providing for the improvement of highways or country roads, as distinguished from city streets, and therefore was, with all proceedings under it, absolutely void.

Constitution of State of New York, art. 3, § 18.

But the town made the improvement in the manner prescribed by this void act, and then proceeded to assess the expense thereof upon the lands abutting on this highway in the exact manner therein prescribed, which was:

> "So much of said assessment shall be raised from each separate lot or parcel of land fronting on any highway to be improved as shall be in the same proportion to the entire amount assessed as the number of feet for which the same shall bound

or front on any highway improved shall be to the aggregate number of [illegible] or frontage or bounds subjected to said assessment. * * *"

Chap. 550, N. Y. State Laws 1893, § 6.

In this manner there was assessed upon the lands now owned by appellee the sum of $10,413.42.

Owing to the fact that this assessment was so plainly void because the law was unconstitutional, no serious attempt was ever made to enforce it, and only a small amount was paid upon it — nothing on account of that portion assessed against appellant's lands. In fact the assessment was abandoned soon after it was levied. Though several installments became due, no effort was made to sell the lands assessed, and matters remained *in statu quo* until September, 1895, when the appellant town levied an entirely new assessment for the whole expense of this improvement and interest.

The only authority for this second assessment is that contained in section 27 of the act of the Legislature of the State of New York, known as chapter 816 of the Laws of 1895. This statute is entitled:

> "An act enlarging and modifying the powers of town officers in towns within counties having over three hundred thousand inhabitants, and providing for public improvements within such towns, except the counties of New York and Kings."

Except for section 27, smuggled into the middle of the act, by appellant's counsel, and in no way referred to in the title, the statute of 1895 refers entirely to future improvements, and while it is general in form, applying to all towns in counties having over 300,000 population adjoining cities having a population of over 250,000, a reference to the United States census shows that Erie is the only county, Buffalo the only city, and appellant town and three others the only towns which meet its requirements. Hence the act was as local in reality as that of 1893, though it circumvented the Constitution in a most barefaced manner. (Matter of Henneberger, 155 N. Y. 420; 25 App. Div. 164.)

Section 27 of the act of 1895 provides:

> "Where any highway or part of highway within any such town has been paved or otherwise permanently improved under any law providing for the assessment of the expense of such improvement locally, such highway shall be subject to the control and management of said board, and where any part of the expense of making such improvement, including interest on

moneys borrowed, and all other incidental expenses in any wise appertaining to the making of the improvement, or money borrowed for that purpose by the town, shall remain unpaid at the time that this act goes into effect, for the purpose of defraying such expenses and of repaying the moneys borrowed, said board is hereby authorized and empowered, and it shall be its duty to cause to be assessed the entire expense of the improvement aforesaid upon the several lots or parcels of land fronting or bounding upon that part of the highway so improved as aforesaid, and in the manner provided by this statute for making local assessments for raising the expenses of grading and paving of streets; and pursuant to the rules of apportionment and division of the expense herein provided. * * *"

It will be noticed these provisions are mandatory, not permissive. Section 30 of the act of 1895 provides in mandatory language the rule of apportionment and division which shall be followed in assessing the expense of paving a highway:

"Section 30. The expenses of local improvements shall be assessed as follows:

* * * for paving or macadamizing a highway or building lateral sewers or water mains in the middle of a highway, the expense shall be assessed on both sides of that part of the highway in which the improvements shall be made. Frontage assessments shall be apportioned as follows: So much of the expense of the improvement shall be raised from each separate lot or parcel of land as shall be in the same proportion to the entire expense locally assessed as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made, shall be to the aggregate number of feet frontage or bounds to be subjected to the entire assessment."

The statute being mandatory, the reassessment of 1895 was made in precise compliance therewith.

The whole expense was divided up and assessed upon the several parcels fronting on the highway in exact proportion to the feet frontage of each parcel. The value, situation with reference to the city and village at either end, depth back from the highway, and the amount of benefit conferred, were all entirely excluded from consideration and in no wise determined or passed upon. The feet frontage of each parcel, the total frontage of all the parcels, and the total of the expense were the only elements which in any wise en-

tered into the simple problem in mathematics which constituted the apportionment of this assessment. The formula laid down by the statute and necessarily applied by the board was: Divide total expense by total feet frontage, multiply the feet frontage of any parcel by the result, and you have the assessment for that parcel.

In this manner there was assessed upon the lands now owned by appellee the sum of $15,854.04. Monthly penalties have been added to this, making the sum due when this action was begun, over $23,000, No portion of this has been paid, and the whole amount became due and payable prior to September, 1896.

Eighty-four separate assessments were levied on as many separate lots. (Plea, p. 24.) These lots varied greatly in depth, situation and value. (Bill, pp. 7–8.) Some necessarily adjoined the city of Buffalo, others the village of Tonawanda, and the rest it is fair to assume (as is the actual fact) ranged from these suburban lots to farms worth less per acre than the value of the suburban lots per square yard. Again, this fine cement and brick boulevard, forty feet wide, must necessarily have benefited the suburban lots and the farms in an utterly different degree. The first assessment was at the rate of $10 per foot front, and the second at the rate of $15 per foot front. (Bill, pp. 2 and 7.) It is quite conceivable that these assessments exceeded in reality the total value of the farms assessed and was vastly greater than the benefit conferred. With their excessive penalties added, they probably do so. The great difference in size of the farm lots as between themselves is shown by the depth of appellee's two parcels — one is 1,012 35/100 feet deep, and the other 3,466 75/100 feet deep. Yet each is assessed the same amount. (Bill, pp. 2 and 7.) Behind the first is of course a tract 2,400 feet deep, which entirely escaped assessment, though in precisely the same situation as 2,400 feet of the rear of the second which was assessed.

The statute provides for the collection of this assessment in the following language:

> "Sec. 45. If any installment of said assessment shall not be paid within one year after the same becomes due and payable, then all the installments shall at once become due and payable * * * and it shall be the duty of the supervisor to advertise said parcel of real estate for sale."

> "Sec. 48. The supervisor shall give notice of the sale of real estate for unpaid assessments by publication of a notice * * * specifying the hour and place of sale. * * * At such time and place he shall offer the property for sale and sell the same to the highest bidder. * * * He shall there-

upon on receiving the amount so bid, issue to the bidder a certificate specifying * * * that at the expiration of one year from day of sale, unless the property shall be sooner redeemed, the bidder * * * shall be entitled to a conveyance of the land sold. * * * If said lands are not redeemed within the year, the supervisor shall execute and deliver a deed of conveyance to the holder of the certificate * * * in the name of the town, by him as supervisor, which conveyance of the lands shall vest the title thereto in fee simple in the grantee * * * and such deed shall be conclusive evidence that the proceedings were regular and valid and taken in conformity to law."

Though the whole assessment upon lands now owned by appellee became due and payable on September 1, 1896, the supervisor, appellant Patton, took no steps towards collecting the same by sale of the lands or otherwise until the month of August, 1899, when the notice of sale required by the statute was duly published, naming September 14, 1899, as the day of sale, and thereupon this action was promptly brought.

The appellant's defense on the trial was based largely upon the ground that appellee was estopped from contesting this assessment of 1895, because the Columbia Land Company was the owner at the time the improvement was made, of the lands now owned by appellee, and signed the consent to the making of the improvement required by the act, chapter 550 of the Laws of 1893.

The facts upon this point are stipulated, and are, that at the time the improvement was ordered in 1893, the Columbia Land Company, a corporation, was the owner in fee of these lands, subject to three purchase-money mortgages, given long prior to the enactment of said statute, chapter 550 of the Laws of 1893, and as such owner it executed the consent to the making of said improvement. This corporation remained the owner of these lands subject to said mortgages until September 7, 1897, when the lands were conveyed on the foreclosure of said mortgages, to the appellee, and two others who afterwards deeded their interest to the appellee. (Stipulation of Facts, pp. 34 and 35.)

Neither the appellee nor his cograntees signed this consent, but derived their title under a mortgage upon the lands, given long before the road was paved or the consents were signed.

Another ground relied upon by appellants is alleged laches on the part of appellee in commencing this action.

The facts upon this point are: The statute of 1893 was so clearly void as being a local act for the improvement of a highway in contra-

vention of the State Constitution, that no attempt was ever made to enforce the original assessment. That assessment became moribund soon after it was levied and was finally superseded by the new assessment levied in September, 1895. About four months after this new assessment was levied, and in February, 1896, several actions were commenced by owners of lands abutting on the highway, in the courts of the State of New York, to set aside both of these assessments, on the ground that the consent in writing of the requisite number of abutting owners to the making of the improvement, had not been obtained. One of these actions, in which Joseph T. Jones was plaintiff, and the present appellants were defendants, was chosen by common consent as a test case. The trial court set aside the assessments and the Appellate Division of the Supreme Court affirmed this judgment. (Bill, pp. 9 and 10; Jones v. Town of Tonawanda, 35 App. Div. 151.)

The Court of Appeals reversed the lower courts in March, 1899 (158 N. Y. 438), sending the case back for a new trial, on the ground that vendees under contracts for the purchase of lands must be counted as "owners."

Shortly after the Jones action was commenced, it was agreed that nothing should be done towards enforcing the assessments until that action was finally determined, and for a period of about two years between the decision of the trial court and that of the Court of Appeals, there was a valid judgment declaring them invalid. This and other actions remained pending until after August 1, 1900.

The appellants did nothing whatever towards collecting the assessment of 1895 until August 1, 1900. Up to that time there was no threatened sale of the plaintiff's lands to enjoin — on the contrary, it was understood that no sale would be attempted. The alleged laches, then, consisted at most in not harassing the appellants when that seemed unnecessary, even assuming that this action could have been maintained before sale was threatened, of which there is serious doubt. It certainly could not have been brought in the New York courts.

Finally, no actual notice to appellee that such an assessment existed is shown, and neither the appellee nor his predecessors in title — the mortgagees of the land — were vested with such an estate as was the necessary foundation of this action until September, 1897, at which time the assessment had been declared void by a competent court.

These are the undisputed facts, and we deem it clear that the only question worthy of serious consideration presented by this appeal, is whether the broad and just principles laid down in the recent decision of this court in the case of Village of Norwood v. Baker (172

U. S., p. 269), still remain the law of the land, and apply to the facts of this case.

Hence, the sole question presented is whether the New York statute (chap. 816 of the Laws of 1895) contravenes the Constitution of the United States, articles V and XIV, in that it provides for the assessment of the expense of the local improvement of a highway, by the frontage rule upon the abutting lands, without reference to or a determination of the benefits conferred thereby upon the several lots.

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# POINTS.

## FIRST.

**A State statute which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved solely in proportion to the feet frontage of such abutting lands without regard to the value of such lands or the benefit thereto is in contravention of the provisions of the Constitution of the United States, articles V and XIV, and an assessment made in pursuance of such statute is void.**

### I.

*This fundamental principle we conceive to have been finally established by the recent decision of this court, in which the whole subject of local assessments and the theory upon which their validity rests is discussed with exhaustive research and resistless logic.*

Village of Norwood v. Baker, 172 U. S. 269.

The opinion of the court in the Norwood case does not mark a revolution in the law; it does, however, inaugurate a new era of return to old principles long and universally recognized and their logical and just application.

That there is a broad and well-defined distinction between general taxation and special assessments upon abutting lands for the local improvement of highways; that general taxation is based upon the duty to support the government in return for general and indirect benefits conferred upon all, while assessments for local improvements

rest for their sole justification upon the theory of special benefit conferred upon the lands assessed; and that the limit of a local assessment is therefore necessarily the amount of the benefit conferred, are principles as old as our government.

And yet these principles had been so lost sight of in the smoke of the struggle to maintain the freedom of legislatures in matters of general taxation, that they had ceased to govern to any practical extent the levying of local assessments for alleged improvements, and the result has been a period in which legislatures under the ægis of the power to tax, have exercised without practical limit the power to confiscate private property by means of local assessments made without reference to benefits conferred.

By the *Norwood* case, this period of confiscation is ended. The Legislature of Ohio had at last thrown aside all pretense of ordering local assessments on the principle of benefit conferred, and had directed that the total expense of opening or improving highways should be assessed upon the abutting lands in proportion to their frontage on the street improved.

The village of Norwood opened a street through lands all owned by one person, paid her the value of the strip taken, and then assessed upon her remaining lands the whole amount paid, with the expenses of the proceeding added.

While it did not necessarily follow that the amount of this assessment exceeded the benefit conferred upon the remainder of the lands, and there was no evidence in the record on that point, the court seized the opportunity presented by the facts of that case to clear away the fog of confusion which had settled over this vital distinction between taxation and assessments for local improvements and to re-establish on firm foundation in the separate class in which they belong, the essential principles governing the exercise of the power to levy the latter.

The Norwood decision marks the beginning of an epoch of reason and justice in the exercise of this dangerous but necessary power to arbitrarily "improve" a man's property against his will, and yet at his expense. The power surely reaches the uttermost limit of necessity and reason when the right to collect the cost of the enforced improvement is made coextensive with the actual value of that improvement, whether desired or not. And to require that this limit shall be ascertained, not in a purely fictitious manner, but by an actual determination on the facts presented by each case, is the barest justice and the only logical rule which can be devised.

To say that the requirements of reason and right are satisfied by a general determination on the part of Legislature, covering all improvements of a given class, that all abutting lands will be benefited

in proportion to an arbitrary rule of apportionment, is absurd on its face. This involves the assumption that the Legislature considered the question of benefits at all, and the possession on its part of a miraculous prescience which is purely imaginary, fictitious and impossible. If any vitality is to be given the requirement that the assessment shall be limited by the benefit, the existence and amount of that benefit must be found as a fact in each case.

There is no escape from the position of the court, except through sophistry and fiction. And Mr. Justice Brewer frankly places his dissenting opinion on these grounds, not because that position is justified by reason or justice, but because he considers the matter settled by a previous decision of this court, and the tendency of other decisions, to class local assessments under the head of taxation which he believes should not be limited.

## II.

It may be urged that the doctrine laid down in the *Norwood* case will upset many assessments made in the era of confiscation just ended, and cause injury and confusion. But as the court says, at page 293 of the opinion:

> "It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment against it. It left the village, in its discretion, to take such steps as were within its power to take either under existing statutes or under any authority that might thereafter be conferred upon it to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property."

These expressions in the opinion are strikingly illustrated by what has already transpired in the present case.

The appellants have sought and obtained from the State Legislature, since the decree appealed from was entered, ample authority to make a new assessment for the expenses of this improvement after "proper inquiry" and ascertainment of the amount of the special benefits accruing to the several lots. This new act, drawn by appellants' counsel, amply safeguards both the appellant town and the owners of the property to be assessed.

*Chapter 307 of the Laws of 1900.*

The title expresses its object in these words:

"An Act to provide for the payment of the expense of improving Delaware Road (so-called), in the town of Tonawanda in Erie County."

The first section of this act provides:

"The town board of the Town of Tonawanda is hereby authorized and empowered to ascertain * * * :

"The expenses which have been made or incurred and remaining unpaid on account of the improvement of the Delaware Road from the City of Buffalo to the Village of Tonawanda through said town, made in eighteen hundred and ninety-three and eighteen hundred and ninety-four, by grading, draining, curbing and paving the same, etc."

And the reassessment of the expense so ascertained, one-fifth upon the town of Tonawanda and four-fifths thereof upon the lands lying on either side of the street, within a radius of 2,000 feet back therefrom, is then provided for with great particularity:

All other acts inconsistent with the provisions of this statute are expressly repealed:

"Section 24. All acts and parts of acts inconsistent with this act are hereby repealed."

It is clear that in this case as in all others that may arise, the only result of the doctrine of Norwood v. Baker, is to produce a speedy reassessment on the just lines laid down in that decision.

Under this new assessment, all lands within 2,000 feet of the highway are to be included; the special benefit to each parcel is to be determined, and only four-fifths instead of all the expense is to be assessed on the abutting property.

The readjustment compelled by the decree in this action is fair to all concerned, and instead of injury, a great good has been accomplished.

The appellant town is now engaged in making this reassessment.

## III.

The only difference between the assessment in this case and that considered in Norwood v. Baker, is in the precise nature of the local improvement. There it was a case of opening a highway. Here it is the pavement of an existing highway. Surely, the doctrine of

the *Norwood* case is not limited by the court, and cannot be limited, on any tenable theory, so as to include the one kind of improvement and exclude the other. That the court did not contemplate the possibility of so narrow and perverse a construction of its decision is apparent in almost every line of the opinion written with tireless thought and care for the express purpose of establishing a doctrine broad enough to cover the whole field of local improvements.

It is on the distinction which the court finds to exist between general taxation and local assessments for improvements that the decision is based. Every word of the court's argument necessarily applies with the same force to one form of local improvement as it does to another, because the essential principle of benefit on which the court rests its decision underlies in precisely the same degree all assessments made for improvements. Throughout the opinion, the court discusses the problem presented as one of local assessments in general, without the slightest suggestion that there can possibly be any distinction between them, or that there was anything peculiar about the particular improvement made by the village of Norwood. Indeed, if the decision is to be limited at all, it would be quite as well to confine its operation to that now famous village, and make it the one spot where legislatures may not confiscate private property,— which would be quite as logical as the limitation the appellants urge, and less difficult to remember.

While appellant's counsel is fertile in suggestions as to possible grounds on which the court might yet exclude the pavement of streets from the operation of its decision, he does not pretend to offer any logical reason for such a limitation. The chief of these suggested sophistries seems to be, in his estimation, the wholly immaterial fact that in the *Norwood* case there had been an actual taking of private property — but as the court is careful to point out (at page 277 of the opinion), this fact had no possible bearing on the decision in that case, for the land taken had been paid for in full and no complaint on the score of that taking could be, or was, made. Another suggested subtlety, without force or logical point, is the fact that street paving and frontage assessments therefor are common — so are frontage assessments for opening and extending streets. Indeed, if the distinction is to be made between those improvements which are common and those which are not, we submit that the paving of country highways is quite the most uncommon of all. Of similar character are all the objections urged to what appellant's counsel is pleased to call "extension of the doctrine." It seems to us wholly unprofitable to seriously discuss all of these abortive efforts to accomplish what is, in the nature of things, impossible. It is puerile to urge that a limitation of this doctrine to any special class of local

improvements can be successful. Any such distinction must necessarily overrule the *Norwood* case, and there would then follow a far worse condition than existed before that decision, because all doubt of the unlimited right of the Legislature to disregard all pretense of assessment according to benefits would be removed.

We cannot believe that this court, which has so recently promulgated a doctrine so sound in principle and so beneficent in its results, after most serious and solemn consideration of every conceivable reason and argument for and against it, can hesitate for an instant to end all frivolous discussion as to whether that doctrine so lucidly stated is really the law of the land — in other words, whether this high court means what it has once said.

Nor do we believe that the court needs the assistance of inferior tribunals to elucidate an opinion which is as clear and unambiguous as language can make it. Still the almost universal agreement of all the courts which have construed (if that word is permissible here) the doctrine of this case, is evidence, though none be needed, that our position is right.

Fay v. Springfield, 94 Fed. Rep. 409.
Loeb v. Trustees, 91 Fed. Rep. 409.
Charles v. City of Marion, 98 Fed. Rep. 538.
Lyon v. Town of Tonawanda, 98 Fed. Rep. 361.
Cowley v. City of Spokane, 99 Fed. Rep. 840.
Hutchinson v. Storrie, 92 Tex. 688.
Sears v. Commissioners, 173 Mass. 350.
Adams v. City (Ind.), 57 N. E. Rep. 114.
McKee v. Town of Pendleton (Ind.), 57 N. E. Rep. 532.
Dexter v. Boston (Mass.), 57 N. E. Rep. 379; 103 Fed. Rep. 357; 103 id. 363.
Vol. 51, Central Law Journal, 243 (where most of these decisions are collated and discussed).

## IV.

No object could be subserved by entering into a discussion of the earlier authorities on this question, since the decision of this court in the *Norwood* case must be deemed final. And even if the question were still open, any argument in support of the court's conclusion must necessarily be a mere repetition of the opinion of Mr. Justice Harlan.

All the New York cases relied upon by appellant have recently been considered and distinguished in the exhaustive opinion of Justice HERRICK, in the case of *In re* Klock (30 App. Div. 24).

## SECOND.

**The New York statute, chapter 816 of the Laws of 1895, which authorized the assessment the collection of which is enjoined by the decree herein, prescribed that the whole expense of paving any highway should be assessed upon the abutting lands solely in proportion to the frontage thereof on such highway, without regard to the value of such lands or the benefit thereto, and was therefore unconstitutional and void.**

### I.

Delaware street was paved, as set forth fully in the statement of facts at the beginning of this brief, in the year 1893, in pursuance of an earlier statute, chapter 550 of the Laws of 1893, which provided for the assessment of the whole expense of that improvement upon the lands fronting on the highway. The assessment made under this earlier act was abandoned because that statute was clearly in contravention of the Constitution of the State of New York, prohibiting the enactment of local statutes for the improvement of highways. (Constitution of the State of New York, art. I, sec. 8.) While the bill of complaint sets up in full this first assessment, and its collection is enjoined along with that levied under the act of 1895, it is conceded that the earlier assessment was superseded by the later one, and it seems unnecessary to weary the court with a consideration of the earlier act or the assessment made thereunder. All the facts relating to that first act and assessment, including the material section of the act itself, are, however, fully set forth in the foregoing statement of facts, if they be considered material.

In the year 1895 the Legislature of New York enacted chapter 816 of the Laws of 1895.

That statute provided for the improvement of any highways situated in towns of 3,000 or more inhabitants, in counties having a population of 300,000 or over, adjoining cities of 250,000 or more population. While this act was really local, applying actually to but four towns, including the appellant, it safely circumvented, in that respect, the State Constitution. All its provisions, with the exception of one section, applied to future improvements. But section 27, in-

terjected into the middle of it, and not referred to in the title, contained this provision:

> "Where any highway or part of highway within any such town has been paved or otherwise permanently improved under any law providing for the assessment of the expense of such improvement locally, such highway shall be subject to the control and management of said board, and where any part of the expense of making such improvement, including interest on moneys borrowed, and all other incidental expenses in any wise appertaining to the making of the improvement, or money borrowed for that purpose by the town, shall remain unpaid at the time that this act goes into effect, for the purpose of defraying such expenses and of repaying the moneys borrowed, said board is hereby authorized and empowered, and it shall be its duty to cause to be assessed the entire expense of the improvement aforesaid upon the several lots or parcels of land fronting or bounding upon that part of the highway so improved as aforesaid, and in the manner provided by this statute for making local assessments for raising the expenses of grading and paving of streets; and pursuant to the rules of apportionment and division of the expense herein provided."

This section, then, directed the appellant town to reassess the expense of paving Delaware street upon the lands abutting thereon, in the manner and according to the rules of apportionment provided elsewhere in the statute for the assessment of the expense incurred in paving highways in the future.

The provisions so referred to are those contained in section 30, and are:

> "The expenses of local improvements shall be assessed as follows: For building or repairing sidewalks, by frontage assessments upon the lots in front of which the walk shall be constructed or repaired; where a lateral water main or lateral sewer is built or repaired for the benefit of the lots on one side of the highway, upon such lots; for paving or macadamizing a highway, or building lateral sewers or water mains in the middle of a highway, the expense shall be assessed upon the lots fronting or bounding on both sides of that part of the highway in which the improvement shall be made. Frontage assessments shall be apportioned as follows: So much of the expense of the improvement shall be raised from each separate lot or parcel of land as shall be in the same proportion to the entire expense

locally assessed, as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made, shall be to the aggregate number of feet of frontage or bounds to be subjected to the entire assessment."

As the statute was mandatory, the officers of appellant town, about September 1, 1895, reassessed the total expense of paving Delaware street in the exact manner prescribed thereby, levying on each lot fronting on the highway an amount in the same proportion to the total assessed as its feet frontage on the highway was to the total feet frontage on both sides of the highway. In other words, the town officers assessed the expense by the simple mathematical rule of dividing the total of expense by the total number of feet frontage, and multiplying the feet of frontage of each parcel by the result. Neither the value of the several parcels, nor the amount of the benefit conferred were considered or ascertained.

II.

*That the act of 1895, in mandatory language required this assessment to be made on precisely the arbitrary and mathematical rule adopted by the appellants, and necessarily excluded all consideration of the amount of the benefit conferred upon the several lots, would seem too clear to require argument.*

But the appellant's counsel made an ingenious contention upon the trial which deserves a passing notice, though it can hardly have been suggested seriously. The learned trial judge describes and disposes of this absurd proposition, born of desperation, in the following language:

"'The expenses of local improvements shall be assessed as follows:

"'For building or repairing sidewalks, by frontage assessment upon the lots in front of which the walk shall be constructed or repaired.'

"It is argued that because the word frontage is here used, the elaborate provision for the apportionment of 'frontage assessments found at the end of the section applies only to sidewalks. Such a construction violates several well-known canons of statutory interpretation. It eviscerates the section, leaving it ambiguous, if not inoperative, as to the more important subjects treated by it. The section provides that the expenses for paving a highway shall be assessed upon the lots fronting or bound-

ing thereon, and then declares that frontage assessments shall be apportioned by the front-foot rule. An assessment upon lots fronting on a highway is 'a frontage assessment' to the same extent as if the words quoted had been used; that the front-foot rule does not relate to sidewalks only is manifest from the language of the last clause of the section. The language requiring the assessments to be levied in proportion as the number of feet 'bound or front' upon the street, probably refers to the local improvements mentioned in all the preceding clauses; it certainly refers to 'lots fronting or bounding' on the street, as described in the clause which immediately precedes it. If the legislature had substituted the words 'assessments upon lots fronting on the street' for 'frontage assessments,' so that the sentence in question would read, 'Assessments upon lots fronting on the street shall be apportioned as follows,' there could be no possible pretense for the contention of the defendants, and yet it is thought that this was unquestionably what the lawmakers meant. Any other construction leaves the section without any definite and certain provision regarding assessments for the most important improvements sanctioned by the law. An interpretation which renders an act meaningless or obscure should always be avoided. That the construction here approved was recognized by all as the proper one prior to the rise of this controversy, is demonstrated by the fact that the board, acting upon the advice of counsel learned in the law and familiar with all the facts, assessed the complainant's lots according to the front-foot rule.'"

## III.

The appellants also contend that the court should assume that both the Legislature, in directing, and the town officers, in making, this assessment, actually determined that the benefits conferred would be, and were, in proportion to the assessments directed and made. It is clear that this is merely a restatement of the theory advanced by the minority in the *Norwood* case, that an imaginary and fictitious determination of benefits by the Legislature, physically impossible because not made with any reference to known or existing facts, is sufficient.

It is precisely this sophistry which the court refused to accept and apply in the *Norwood* case, and the facts there and those now before the court are precisely the same in this respect.

There is no pretense that either the Legislature or the town did anything which was not done by the Legislature of Ohio and the vil-

lage of Norwood. The Legislature here, as there, adopted an imperative general rule, and the town officers had no power to resist its application. Their duty was defined and limited, and could not be performed in any other way than that directed. No determination of benefits which they might have made could have had the slightest scintilla of validity, and, in fact, no such determination was made by them. The argument that they must be presumed to have done their duty, advanced by appellants' counsel, works to a result not intended by him — their duty was to assess solely by the front-foot rule — hence, it is to be presumed that they did not act in some other way.

## IV.

Clearly, the rule of apportionment provided by the act of 1895, and followed in levying the assessments upon the appellee's lots, was the front-foot rule, pure and simple, and excluded from all consideration the benefits conferred.

## THIRD.

**The appellee has no adequate remedy at law, and an action in equity to enjoin the collection of this void assessment by the threatened sale and conveyance of appellee's lands was properly maintained.**

## I.

*Where an assessment is wholly void because levied under an unconstitutional statute, and that statute provides for the sale of the lands assessed on default in payment, and the delivery of a deed conveying the title in fee to the purchaser, and makes the deed conclusive evidence of the validity of the assessment and sale, "and conclusive evidence that the proceedings were regular and valid and taken in conformity to law," and such sale is actually threatened and about to occur, an action in equity may be maintained to permanently enjoin the collection thereof.*

Village of Norwood v. Baker, 172 U. S. 269.
Tingue v. Village of Portchester, 101 N. Y. 294.
Vaughn v. Village of Portchester, 135 N. Y. 460.
Fay v. The City of Springfield, 94 Fed. Rep. 409
(and all the cases above cited under Point First).

The *Norwood* case established the principle that such relief by bill in equity will be granted in precisely these circumstances. As the question was under the United States Constitution, and the action originated in the Federal courts, the rules of those courts as to the remedy must prevail.

But as will be seen from the decisions cited above, if it be deemed material, the New York courts, under the same circumstance, would grant this same relief by injunction where proceedings to sell had been actually instituted, this being the line in New York between those cases where relief by injunction will be granted and those where it will not.

II.

That the appellee's lands were actually advertised for sale when this action was commenced; that the statute provided for such sale and conveyance, to the purchaser, of the fee in the lands, by deed, which is made conclusive evidence of the validity of the assessment and that all proceedings were regular and valid and taken in conformity to law, areall facts established by the record and conceded.

Statement of Facts, *supra*.

III.

Appellants' assertion that the statute and the Code of the State of New York provide an adequate remedy at law, by certiorari to review, is wholly untenable and without merit.

The review by *certiorari* provided for by the statute and Code could in the nature of things reach only such defects and inequalities in the roll as appellants' officers had power to correct. There was no question of *correction* here, because the assessment had been made exactly as the law required, and there was no power to make any change. On *certiorari* the court can act only through the town officers by commanding them to do something which they have the power to do. There being no power to change, *certiorari* could have given no relief whatever.

## FOURTH.

**The Circuit Court rightly held that appellee was not estopped from contesting this assessment.**

I.

The facts on which this claim of estoppel is founded by appellants are so elaborately set forth in the statement of facts which precedes

this argument that we may be permitted to repeat them only very briefly here.

In July, 1893, the Columbia Land Company, the owner of the land of appellee at the time, subject to mortgages given in 1891, executed the consent to the improvement required by the act of 1893; the plaintiff had no interest in the property until September, 1897, when he acquired it, not through the Columbia Land Company, but by referee's deed on foreclosure of the mortgages, which were a valid lien upon the property from a time long prior to 1893. Neither the appellant nor any persons through whom his title was derived signed this consent; nor does it appear that appellee, or his predecessors in title, had any actual knowledge of the making of this improvement.

How the shadow of estoppel can be predicated on these, the admitted facts, it is very difficult to conceive, especially when this defense of estoppel is set up, not as to the assessment of 1893, but as to the reassessment of 1895, to which neither the Columbia Land Company, nor anyone else, had the opportunity to consent or protest.

The Columbia Land Company was in no sense a predecessor in title of the appellee and no privity in interest exists between them, for the title of the appellee relates back to 1891, when the mortgages through which the title comes were executed. Clearly, nothing which subsequent owners of the equity of redemption might do, after that time, could affect the title so derived.

The appellee received nothing from the Columbia Land Company. His title is derived from a prior hostile source and came to him, not through, but in spite of that company, as the result of an action successfully maintained against it.

To hold the appellee estopped by these acts of a hostile stranger to his title, from whom he has received nothing, and in whose place he does not stand, would be a strange perversion of those principles of equity upon which the doctrine of estoppel *in pais* is founded, and requires an extension of that doctrine far beyond its well-defined limits purely to accomplish an unnecessary wrong.

Brant v. Virginia Coal & Iron Co., 93 U. S. 326, at pages 335–336.
Steel v. Smelting, 106 U. S. 447, at pages 455–456.
Coan v. Osgood, 15 Barb. 588.
Carver v. Astor, 4 Pet. 1, at page 83.
Oliver v. Piatt, 3 How. 333, at page 412.
Sabariego v. Maverick, 124 U. S. 261, 264.
Corning v. The Troy Iron & Nail Factory, 40 N. Y. 191.

## II.

*More, however, the appellants have failed to establish facts sufficient to justify the conclusion that even the Columbia Land Company would be estopped from contesting the assessment of 1895, were it now the owner of the lands and the plaintiff in this action.*

The learned trial judge places his decision upon this broad ground as well as upon the proposition that the acts of the Columbia Land Company could not bind this appellee.

His conclusions on this whole question of estoppel are so cogently expressed as to leave nothing more to be said:

> "First. Even though the complainant was in privity with the Columbia company, an assent to be assessed under the law of 1893 was not an assent under the law of 1895, with all its changed conditions and additional burdens.
>
> "Second. A petition for an improvement is not a petition for an illegal assessment.
>
> "In all the company's acts there is nothing inconsistent with the theory that it supposed the expense of the improvement would be lawfully and justly apportioned. It did not assent to extortion or to confiscation or to the taking of its property for public use without compensation.
>
> "Third. As the law under which the proceedings were instituted was unconstitutional and void, the consents given thereunder were inoperative and bound no one.
>
> "That in the circumstances here, where neither the Columbia company nor the complainant has received any advantage or retained any benefit under the law, the right to assert its unconstitutionality was not and could not be waived.
>
> "Fourth. The essential elements of an estoppel are lacking, there being nothing to show that the defendant relied upon the company's acts or were misled thereby. There is nothing to show that the petition and consent induced the improvement. For aught that appears to the contrary, the pavement would have been laid precisely as it was laid if the Columbia company had never existed. No injury to the defendants or benefit to the complainant followed from these acts.
>
> "Fifth. The complainant is not in privity with the Columbia company. His title is derived from prior purchase-money mortgages, and since he obtained title he has maintained a position of open and avowed hostility to what he insists is an illegal tax.

"It may well be doubted whether the complainant was in privity with the Columbia Land Company. His title was derived from a conveyance prior to the deed to the company. The company held only the equity of redemption and could do nothing to impair the value of a prior mortgage. The complainant's title did not come from or through the company; it came from a source which was paramount, prior, and in a sense hostile to the company's title."

A decision of the New York Court of Appeals is directly in point, holding that one who consents to an improvement is not estopped from contesting it on the ground that a sufficient number of other consents has not been obtained.

In the Matter of Sharp, 56 N. Y. 257, at page 259.

## FIFTH.

**The Circuit Court rightly decided that the appellee had not been guilty of such laches as should prevent him from maintaining this action.**

I.

As we demonstrated with great care at the outset (statement of facts), from the time the assessment of 1895 was levied in September of that year down to August 1, 1899, there was no period at which there was the slightest reason for starting this action. From February, 1896, to August, 1899, several actions brought by other persons against the appellants were pending in the State courts to set aside the assessment on other grounds, and it had been generally understood and agreed that no attempt would be made to collect any of the assessments until after those actions were finally decided, and for a period of more than a year there was in fact a valid judgment granted by a competent court and affirmed by the Appellate Division of the Supreme Court, declaring the assessment void and enjoining its collection.

Jones v. Tonawanda, 35 App. Div. 151.

While the Court of Appeals finally reversed that judgment, directing a new trial, this did not occur until March, 1899, and the action was not finally disposed of until about August 1, 1899, when, for the first time, proceedings to enforce the assessment were threat-

ened and taken. During all this period, negotiations looking towards reapportionment of this expense on lines of greater justice were being carried on. Prior to August 1, 1899, there was no threatened sale of appellee's lands to enjoin. Immediately after that day and on September 13, 1899, the bill herein was filed.

It is hardly necessary to remark that the appellants cannot be permitted to go back of the assessment of 1895 to discover this alleged laches, since the appellee certainly could not commence an action to enjoin the collection of the latter before it existed.

And it further appears that neither the appellee nor his predecessors in title were the owners of such a title as was the necessary foundation of an action until September, 1897 at which time there was a valid judgment declaring the assessment void.

If the appellee had commenced this action sooner than he did, he would have done it without other object, purpose, or result, than to unnecessarily harass the appellants. Moreover, there is no evidence whatever that any injury was suffered by the appellants in consequence of the postponement of action by the appellee until a time when there existed a sound reason for it.

If any authority is needed on so evident a proposition as that here presented, it will be found in a decision of the New York Court of Appeals upon facts which happen to be of a similar nature, though vastly stronger, because the gravamen of the petition there was irregularity, not absolute illegality, and the delay was seven years.

Matter of Lord, 78 N. Y. 109.

## SIXTH.

**The Circuit Court committed no error in deciding that it was not incumbent upon the appellee to show definite injury, to entitle him to the relief granted.**

### I.

This we conceive to be the vital principle of Norwood v. Baker — the precise point for which that decision stands.

The court takes great care that there shall be no misconception of the doctrine it intends to promulgate, and, with this object in view, distinctly and emphatically, calls attention to the absence of any proof that the assessment is greater than the benefit conferred by the improvement. It does not avoid this issue, but seeks it; does not even cover up the absence of proof with the suggestion of inferences which might supply it. There is no veneering, no

glossing over, but a direct and intentional assertion that this proof is not to be found in the record, even in the form of suggestive probability.

To overlook this, the pith of the decision, is to be wholly and purposely unseeing, for the language of the court is:

> "It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show, nor offer to show, by proof that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that if the proof had showed an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was, therefore, the only appropriate one."

And in the mind of Mr. Justice Harlan, who wrote that opinion, there was no uncertainty as to its results or the meaning it would convey. Its whole purpose is to bring to a suffering people a practical and effective relief from the unreasonable and unjustifiable theories of the divine right of legislatures to confiscate in the name of taxation.

And that is why Mr. Justice Harlan places that decision on the broadest grounds, and with endless pains excludes every possibility of limitation or distinction which might break its intended force and effect.

## II.

We do not believe it to be material in the slightest degree, but the facts presented in this case afford the strongest basis for at least the

reasonable inference, that the assessment upon the appellee's lands was in excess of the benefits conferred, and probably greater than the total value of those lands. The road improved is not a city street with lots bordering on it of small frontages and great proportionate value, but a country highway running through large tracts of vacant land with frontages running up to hundreds, even thousands of feet (the plaintiff himself having a frontage of more than a thousand feet), and yet this highway is paved with cement and brick to the extraordinary width of forty feet throughout its length of three miles, making of it a great thoroughfare between a large city and a populous village, and the cost, all thrown on the adjoining farms, in the middle, and the suburban lots, at either end, assessed entirely by the frontage rule, amounts to $10 for each foot of frontage, without interest, and to nearly $15 with interest. The plaintiff's total assessment for this "improvement" being $15,000 on these two farms — to which, if the assessment were now sustained, would be added nearly $7,500 more in penalties for nonpayment.

Is it not a fair assumption that the cost is greater than the gain? — That the total is more than the land is worth?

Again, there are eighty-four lots assessed in all. Is it conceivable that injustice was not done to some of these lots, where all are assessed on the same mathematical basis, without regard to their value, or depth? When they must necessarily range from city and village lots at either end, to farms like the plaintiff's in the middle? One of plaintiff's farms is 1,000 feet deep, the other 3,400 feet deep. Yet they are assessed within a few dollars of the same amount, and a tract 2,400 feet deep behind the first, shares no part of the expense, while it is in precisely the same position as 2,400 feet in the rear of the other which *is* assessed.

Clearly it might be asserted with reason that assessment beyond possible benefit is here shown.

## SEVENTH.

**As a statute, chapter 307 of the Laws of 1900, has been enacted by the New York State Legislature since the decree was granted herein, repealing all inconsistent laws and authorizing the reassessment, on just lines, of the expense of this improvement, the injunction forbidding a sale under the assessment of 1895 should now stand in any event.**

The purpose of pressing this appeal since the enactment of this statute, is a mystery which we are unable to solve.

As we have shown, quoting largely from its provisions (Point First), the Legislature, as a result of the decision by the Circuit Court in this case, passed in March of 1900, a statute drawn by appellants' counsel, which authorizes the reapportionment, on equitable lines, of the whole expense of this improvement, one-fifth thereof upon all the taxable property in the town, and four-fifths, only, on the lands adjoining the highway, in proportion to benefits accruing thereto, repealing all acts inconsistent therewith.

Chapter 307 of the Laws of 1900.

We are loath to believe that the appellants seek to reverse the decree herein with the object of still enforcing the payment of the assessment of 1895, and its accumulation of penalties, amounting now to one-half the sum in addition thereto. Of course, the penalties would be pure profit to the appellants, but it does not seem possible that the town desires to gain for itself such a profit. And yet the appellants must assume, for some reason unknown to us, that this old assessment is not as yet superseded or vacated by the new act which repeals the law under which it was levied. And what then? The motive behind their present attitude is still inscrutable.

## EIGHTH.

**The decree of the Circuit Court appealed from should be affirmed, with the costs of this appeal to the appellee.**

Respectfully submitted,

TRACY C. BECKER,

*Counsel for Appellee,*

Buffalo, N. Y.

2382

# Supreme Court of the United States.

No. 214.—October Term, 1900.

The Town of Tonawanda and John K. Patton, Appellants, vs. James B. Lyon. } Appeal from the Circuit Court of the United States for the Northern District of New York.

[April 29, 1901.]

This was the case of a bill in equity filed in the Circuit Court of the United States for the Northern District of New York on September 9, 1899, by James B. Lyon, a citizen of the State of New York, against the town of Tonawanda, a municipal corporation of that State, and John K. Patton, supervisor of said town. The object of the bill was to restrain the defendants from enforcing payment of a certain assessment against tracts or parcels of land belonging to the complainant, situated in the town of Tonawanda, and abutting on Delaware street in said town. The assessment was levied against said tracts of land to meet the expense of grading and paving said street, in pursuance of the provisions of statutes of the State of New York and of an order of the town board of Tonawanda. The principal matter complained of was that the method of meeting the expense of grading and paving the said street was by assessing the same against the lots abutting on the street according to frontage thereon, and that the statutes and proceedings thereunder, which provided for that method, were contrary to the provisions of the Constitution of the United States, in that thereby the land of the complainant would be taken for public use without just compensation and be deprived of his property without due process of law.

The case came on for final hearing on bill, answer and a stipulation of facts, and on January 17, 1900, the Circuit Court decreed, among other things, as follows:

"That those parts of the acts of the legislature of the State of New York mentioned and set forth in plaintiff's bill of complaint, to wit, of chapter 550 of the laws of the State of New York for the year 1893, and of chapter 816 of the laws of the State of New York for the year 1895, which authorize and require the town board of said town to levy the assessment for the entire expense of paving said Delaware street, set forth in the bill of complaint, upon the complainant's said parcels of land described in said bill of complaint and the other lands fronting on said Delaware street, and the acts of the said defendant, the town of Tonawanda, by its town board, mentioned in said bill of complaint, in levying said assessments upon said

lands according to the rule prescribed in said acts of said legislature, to wit, in the proportion which the number of front feet of each of said lots and parcels of land bounding and fronting on said Delaware street in front of which said improvement of paving said street was made, and which are assessed therefor in and by said assessment, bear and are to the aggregate number of feet of frontage of all the lots of land so bounding on the portion of said street in front of which said improvement was made, was and were, and each and every of said provisions of said acts of the legislature of the State of New York and all acts of said defendant, the town of Tonawanda, in levying said assessment in the manner and form aforesaid, are wholly unconstitutional and void as being contrary to the provisions of the Constitution of the United States."

And thereupon the town of Tonawanda and John K. Patton as supervisor of said town were forever enjoined and restrained "from in any manner collecting or enforcing payment of such assessments against said complainant or his land or property." (98 Fed. Rep. 602.)

On January 17, 1900, an appeal from said decree to this court was prayed for and allowed.

Mr. Justice SHIRAS delivered the opinion of the Court.

The complainant in the court below did not put his claim for equitable relief upon any allegation that, in the proceedings to pave Delaware street and to assess the cost of the improvement upon the abutting property, there had been any departure from the provisions of the statute, or that there had been attempted any discrimination against him or his property. Nor was it denied that it is the settled law of the State of New York that the method prescribed, of meeting the expense by apportioning the entire cost of such an improvement upon the abutting land according to the foot-front rule, is a valid exercise of legislative power. (*The People* v. *Mayor &c.*, 4 N. Y. 419; *Spencer* v. *Merchant*, 100 N. Y. 585.)

What was claimed was that a State statute, which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved in proportion to the feet frontage of such lands, without providing for a judicial inquiry into the value of such lands and the benefits actually to accrue to them by the proposed improvement, is unconstitutional and void. And it was held by the court below that, notwithstanding the courts of the State may have held otherwise, it was its duty to follow the decision of this court in the case of *Norwood* v. *Baker*, (172 U. S. 269,) which was regarded by the court below as establishing the principle contended for, and accordingly the defendants were enjoined from enforcing payment of the assessment. But we think that, in so understanding and applying the decision in *Norwood* v. *Baker*, the learned judge extended the doctrine of that case beyond its necessary meaning.

It was not the intention of the court, in that case, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress. The case of *Norwood* v. *Baker* presented, as the judge in the court in the present case well said, "considerations of peculiar and extraordinary hardships," amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment.

The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances; and it is obvious, from expressions in the opinion of the trial judge, that he reached his conclusion because constrained by what he understood to be the principle established by the Norwood case.

It is unnecessary to enter into an examination of the authorities on this subject, as that has recently been done in *French* v. *Barber Asphalt Paving Co.*, in error to the Supreme Court of the State of Missouri, and in *Wight* v. *Davidson*, on appeal from the Court of Appeals of the District of Columbia, in the former of which the effect of the Fourteenth, and, in the latter, that of the Fifth Amendment, was considered. (181 U. S. ——.)

There were other questions passed upon in the trial court and discussed in the briefs, but the conclusion we now reach renders it unnecessary for us to consider them.

*The decree of the Circuit Court is reversed and the cause is remanded to that court with directions to dismiss the bill of complaint.*

True copy.

Test:

*Clerk Supreme Court, U. S.*

# Supreme Court of the United States.

No. 214.—October Term, 1900.

The Town of Tonawanda and John K. Patten, Appellants, *vs.* James B. Lyon. } Appeal from the Circuit Court of the United States for the Northern District of New York.

[April —th 1901.]

Mr. Justice Harlan (with whom concurred Mr. Justice White and Mr. Justice McKenna,) dissenting.

My views touching the general questions arising in this case have been expressed in *French* v. *Barber Asphalt Paving Company* and in *Wight* v. *Davidson*, just determined. I adhere to those views, and therefore dissent from the judgment in this case. As stated by the Circuit Court, the special assessment in question was "in the proportion which the number of front feet of each of said lots and parcels of land bounding and fronting on said Delaware street in front of which said improvement of paving said street was made, and which are assessed therefor in and by said assessment, bear and are to the aggregate number of feet of frontage of all the lots so bounding on the portion of said street in front of which said improvement was made." The case, therefore, is one in which, beyond question, private property is specially assessed by the front foot, in the interest of the whole public, for the entire cost of paving a highway, without reference to any special benefits accruing to it, and without the owner of the property being permitted to show that such cost amounts to the confiscation of his property to the extent that it substantially exceeds special benefits, or that it exceeds the value of the property assessed.

The court says that it was not the intention of this court in *Norwood* v. *Baker* to hold "that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States." The contrary was not asserted by the learned judge of the Circuit Court, nor has any one in this case contended that the Fourteenth Amendment subverted the taxing systems of the States. But it was contended, and such is my position, that nothing can be done by or under the authority of a State in violation of that Amendment. After that Amendment became part of the Constitution, the only provisions in the State taxing laws or

systems that ceased to have operation were those that were inconsistent with the Amendment. No one, I assume, will dispute that proposition.

The court also says that the purpose of the Fourteenth Amendment "is to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress." I assent most cordially to this view, and therefore, in another case, felt obliged to express my objection to the intimation that possibly that might be done by Congress under the due process clause of the Fifth Amendment which could not be done by a State under the same clause of the Fourteenth Amendment.

True copy.

Test:

*Clerk Supreme Court, U. S.*